Euer, Sampson (57)

41

Tryals per Pais;

OR, THE

LAW,

CONCERNING

JURIES

BY

Nisi-Prius, &c.

Methodically Composed for the Publick Good, in the 16*th* Year of the Reign of our Soveraign Lord CHARLS the Second, King of *England*, *Scotland*, *France* and *Ireland*, &c.

By *S. E.* of the *Inner-Temple*, Esquire.

Giles Duncombe

Per testes solum, lex ipsa nunquam litem dirimit, quæ per Juratam xij. hominum *decidi poterit. Cum si modus iste ad veritatem eliciendam multo potior, & efficatior, quàm est forma aliquarum aliarum legum orbis.* Fortescue, cap. 31.

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The PREFACE.

THE Philoſopher could not ſee a man unleſs he hear him ſpeak. *Loquere ut videam*; Speech is the Index of the Mind, and the Mind only diſcriminates the Man: For, although an *Ideot* who hath but the ſhape of a man, may with ſilence ſo hide his folly, that ſtrangers to his Manners cannot diſcern him from a Sophiſter; Yet, doubtleſs, Silence is the greateſt Enemy to Learning, the Grave wherein oblivion buries the Parts and Knowledg of the braveſt ſpirits.

Wherefore Learned *Saluſt*, from this takes his Exordium;

The Preface.

Omnes homines qui ſeſe ſtudent præſtare cæteris animalibus, ſumma ope niti decet, ne vitam ſilentia tranſeant, veluti pecora, Thoſe men who would excel Beaſts, ſhould labour that their lives might not paſſe in ſuch ſilence, as Beaſts do. It ſeems he deemed, that man little inferior to a Beaſt, who acted nothing to prolong his Memory; For this he held to be the duty of every man, ſaying, *Quo mihi rectius eſſe videtur, ingenii quàm virium opibus gloriam quærere; & quoniam vita ipſa, qua fruimur, brevis eſt, memoriam noſtri quàm maxime longam effiere.* In my opinion, 'tis far better, to acquire Glory by the Riches of Wit, then ſtrength; and becauſe our lives are ſhort of themſelves, we ſhould indeavour by Ingenuity, to eternize their memory.

And

And to effect this, *Nulla dies abeat, quin linea ducta ſuperſit*; No day ſhould paſſe over our heads, wherein we ſhould not act ſome memorable exploit: Men ſhould not live like *Snails*, never ſtirring out of their Houſes; but be active (I mean not buſie-bodies in other mens matters, but) in their own Callings, of which the wiſe *Cato* tells us, *Every man ſhould give a reaſonable account*; And if we believe the famous *Seneca*, *Nihil eſt turpius quàm grandis natu ſenex, qui nullum habet vitæ ſuæ argumentum, quo diu ſe vixiſſe dicat, præter ætatem.* Nothing is more unworthy, than an old man, who hath nothing to ſhew for his Antiquity, but a Gray-Beard; who is no ſooner dead, than forgotten, long before he is half rotten; yet who is ſo apt to deride the Endeavors

Nulla dies ſine linea.

of other men, as this antient *Ignoramus*, whose wrinckles in his face, worn-out looks, and many years sway more with the vulgar people, than all the Arguments of Law or Reason: Had *Seneca* been such a silent *Momus*, the World would never have been blest, with his so learned Works. And doubtless, writing Books is needfull in no Science more, than in the Law; For without Books, how would the Lawyers do for Arguments at the Barr, or Resolutions at their Chambers: Whence the Oracle Sir *Edward Coke* pronounces this, *Omnes debere Juris-prudentiæ libris componendis animum adjicere*; That all men ought to addict themselves to the Composing Books of Law; some to the Reporting of the Judgments and Resolutions of the Judges, who are

Lex

Lex loquens; and some to the collecting of these Cases and Resolutions, methodizing, and fitting them for some particular purpose, as *Littleton*, *Standford*, *Fitzherbert*, *Crumpton*, *Perkins*, *Finch*, &c. and indeed, most of the Law-Books extant, if not all, (setting aside the Reports) are nothing else, but Collections out of others. This I speak, not in derogation of them, in the least; for as 'tis equally, if not more laborious; so 'tis full as glorious, Judiciously to cull out authentick Cases, out of the Volumes of the Law (where so many are no Law), and rightfully place them in a particular Treatise, as 'tis to report the Judgements and Resolutions from the mouth of the Court; for the Reporter is but the Courts Secretary, and *Cook*'s Institutes merit as much as his

Reports; And *Ash*'s Tables, *Fitzherbert*, and *Brooks*'s Abridgment, are as useful as the Year-Books themselves, of which kind of Collections, one Elegantly thus breaks out, *Quo quidem beneficio, haud scio, aut aliud aut legum Candidatis magis gratum, aut Reipublicæ magis commodum, aut divini honoris illustrationis magis idoneum, vel cogitando quidem consequi, quisquam poterit.* Then which benefit I know not, whether any man can even imagine another, either to Lawyers more grateful, or to the Commonwealth more profitable, or for the illustration of divine honour more fit. For with the least labour, a small price, and little time, they present you with those Resolutions, and Judgments which lye scattered in the voluminous Books of the Law; which would otherwise

cost

coſt much time, pains and charges, to find out. The thoughts of which publick good, firſt gave life to theſe Endeavors of mine: Not that any one ſhould in the leaſt imagine, that I am ſo guilty of vain oſtentation, as to believe, that my Parts or Abilities can perform any thing in this kind, like other men: No, *Ipſe mihi nunquam Judice me placui.*

I could never yet pleaſe my ſelf with my own labours, much leſſe are they worthy to pleaſe others, *haud equidem tali me dignor honore.* However, when I conſider, that no man hath yet written particularly concerning this Subject, and of what generall uſe it is, I doubt not, but that this Treatiſe will receive a favourable conſtruction from moſt men, and a plauſible acceptation from others.

The

The Use of the Book.

The use of it, is, in a manner Epidemicall; since mens Lives and Estates are subject to the Tryall *per Pais*, here demonstrated; but in particular, the Practisers at Law, (especially *Attorneys*, *Solicitors*, *Clerks*, &c. and all *Jurors*, (for whose directions it is of singular use) are chiefly concerned herein. But I will not hang a Bush out, to invite, and prepossess your Judgments, *Vincat utilitas*. The profit which every ingenious Reader shall gather out of it, will speak more for it, than the best Eulogical Preface.

And for my own part, I professs my self to be *Philomathes*, but can plead no other Plea than *Not guilty*, to *Polymathes*. I must confess, never any man took a Law-Book in hand, with greater affection to it, than I: and notwithstanding, the hard favoure

favoured objections, which ſome men caſt upon it, I really think the ſtudy of the Law, to be the moſt pleaſant Study in the World. And he which delighteth in the ſtudy of any other Art or Science, muſt conſequently be delighted with this. For the knowledg of the Law, as *Doderidge* ſaith, is moſt truly ſtiled *Rerum Divinarum humanarumque ſcientia*, and worthily imputed to be the *Science of Sciences*; for therein lies hid, the knowledg of every other Learned Science.

So that he which gives himſelf to the ſtudy of Divinity, may here fill himſelf with holy and pious Principles of Divine Laws: For, *Lex eſt ſanctio ſancta, jubens honeſta, & prohibens contraria; ſanctum etenim oportet, quod eſſe ſanctum definitum.* The Law is a holy Sanction, or Decree, *Forteſcue*, cap. 3.

cree, commanding things tha
be honeſt, and forbidding th
contraries: Now the thing mu
needs be holy, which by defin
tion, is determined to be holy
So that in this reſpect, ſai
Forteſcue, men may well ca
Lawyers, *Sacerdotes*, that is, g
vers, or teachers of holy things
For the Lawes being holy,
followeth, that the Miniſters
and ſetters forth of them, mu
be givers of holy things; an
ſo by interpretation, doth *Sa*
cerdos ſignifie; and doubtleſs
he which duly conſiders thoſ
Rules of *Theology*, which lie ſca
tered throughout the whol
body of the Law, muſt need
conclude our Lawes to b
Commentaries upon the Ol
and New Teſtament; and do ſ
much bear the Image *Legis Di*
vinæ, that they may well be a
tributed to the Moſt High.

Th

The Rules of *Grammar*, *Philo-*
phy natural, *Political*, *Oecono-*
ick, and *Morall*; as alſo the
Grounds of *Logick*, both from
he *Predicable*, and *Predicament*,
c. and of other Arts, and Sci-
nces, ſo much abound in our
ooks, that the very reading of
he Law, will make a man *Ma-*
er of any of thoſe Sciences.

And ſince *Rhetorick* is *Ars or-*
ate dicendi, and conſiſteth of
hoſe two parts, *Elocution*, and
ronunciation.

How can we read in our
aw-Books, thoſe Learned Ar-
uments, Elegant Speeches,
nd Judgments pronounced with
ich Eloquence of words and
atter, and not conclude, that
hetorick is the Glory and
race of a Lawyer. Though
ome (not gifted that way)
ould perſwade us, that the
aw hath little relation to it.

If

The Preface.

If any man be delighted in History, let him read the Books of Law, which are nothing else but Annalls and Chronicles of things done and acted from year to year; in which every Case presents you with a petite History; and if variety of matter doth most delight the Reader, doubtless, the reading of those Cases, (which differ like mens faces) though like the Stars in number, is the most pleasant reading in the World.

I thought to have expatiated my self in this Eulogicall Commendation of the Study of the Law; But when I consider the Glory of the thing it self, I think it but in vain to light the Sun with Candles; and as no Arguments will perswade one to love against Nature, so he whom the rarity of the Law it self cannot invite to study it

wi

will never be forced to it with the fiſt of Logick, or other perſwaſion: Wherefore 'tis now time to expoſe my ſelf to the Cenſure of the Reader, who alwayes judges according to his capacity, or affection; for which cauſe, if I was to chuſe my Reader, I could wiſh with *Gaius Lucilius*, *Quod ea quæ ſcribo, neque ab indoctiſſimis, neq; à doctiſſimis legi, quod alteri nihil intelligerent, alteri plus forteſſe, quam ipſe de ſe.* That this Treatiſe might not be read, of the moſt Learned, nor of thoſe who are not learned at all, becauſe theſe underſtand nothing, and the others more perhaps than my ſelf.

However, I put this Requeſt to all, *ut ſi quid ſuperfluum, vel ſuperam poſitum, in hoc opere ſervenerit, illud corrigant, & emendent,* *Bracton. li. 1. fo. 1.*

emendent, vel Conniventibus oculis pertranseant; Cum omnia habere in memoria, & in nullo peccare, divinum sit potius quàm humanum: That if any thing be superfluous, and placed amiss in this Work, That they will either correct and amend it, or without carping connive at it; since to remember to do all things right, and nothing amiss is rather the part of a God, than Man: wherefore let him which never offended, cast the first stone.

S. E.

Tryal

To the Reader.

I Thought to have made a Table to this Book; but when I considered the particulars hereof were collected under general Heads, and Titles; and the matters therein pointed to, with Marginall Notes; I concluded to present you onely with the Contents of the Chapters; but would advise you, not to rely altogether, upon the view of the Contents: *For what you cannot finde there, you may perhaps finde in the Chapters at large.*

ERRATA.

SOme Errors have riſen from the *Preſs*; for inſtance, *fo.* 133. where *D.* is the laſt letter of the line in the Margent, add *where the Treſpaſs was committed in the County of S.* Likewiſe the falſe pointing in ſome places, may ſeem to alter the ſence: as a *Comma* being put for a *Period*, *&c.* But the Reader having long ſince eſpouſed Juriſprudence; and thereof got Iſſue a good Judgment, is bound *per la Courteſie dengleterre*, to amend, or wink at ſuch miſpriſions. *pa.* 17. *line* 19. for *Cro.* 2. read *Cro.* 1. *p.* 76. *l.* 3. add *in Civitate Weſtm.* next to *Margaretæ*. *p.* 163. *l.* 11. for *Aliens*, r. *Engliſh*. *p.* 142. *l.* 1. add *in* next *be*. *fo.* 210. at the end of the Title of the 14*th* Chapter, it ſhould be, *An Amercement aſſered by the Jury*. *fo.* 223. *li.* laſt, for *offered*, read *afferred*.

A

A Summary of the Contents of each Chapter in this Book.

Cap. 1. Fol. 1.

THe Derivation of the word (Jury). The Definition, Antiquity, and Excellency of Juries, by way of Preface.

Cap. 2. fo. 5.

Of an Iſſue; and the divers ſorts of Tryalls thereof; and when a

(a) 2 Tryall

Tryall shall be by a Jury, *and when not: when by* Certificate, *when by* Battail, *and when by an* Almanack, *&c. What* Issue *shall be first tryed* per Pais; *what shall be tryed by the Court; and what by examination of the* Attorney, Sheriff, *&c.*

Cap. 3. fo. 24.

Of a Venire facias; *To whom it shall be directed; when to the* Sheriff, *when to the* Coroners, *when to* Elisors, *and when to* Bayliffs.

Cap. 4. fo. 38.

What faults in the Venire facias *shall vitiate the Tryall, what not; when a* Venire facias de novo, *shall be awarded; when severall* Ven. fac. *when the* Ven. fac. *shall be betwixt the party, and a stranger*

to

to the Iſſue. *Who may have a* Ven. fac. *by* Proviſo, *and when.*

Cap. 5. fo. 50.

Why the Ven. fac. *runs to have the* Jury *appear at* Weſtm. *though the Tryall be in the Country; Of the Writ of* Niſi prius, *when firſt given, when grantable, when not, and in what Writs of the* Tales, *at common Law, and by Stat. Where, when the Tranſcript of the Record of the* Niſi prius, *differs from the Roll, whereby the* Plaintiff *is non-ſuited, he may have a* Diſtringas de novo.

Cap. 6. fo. 64.

Of the number of the Jurors, *and why the* Sheriff *returns* 24. *though he* Venire facias *mentions but* 12. *If he returns more or leſs, no Error; and of the number* 12.

Cap. 7. fo. 68.

Who may be Jurors, *who not, who exempted, and of their Quality and Sufficiency.*

Cap. 8. fo. 75.

Concerning the Viſne, *from what place the Jury ſhall come*, &c.

Cap. 9. fo. 99.

The Law concerning Challenges, *very neceſſary to be known of all men.*

Cap. 10. fo. 131.

Of what things a Jury *may inquire, when of ſpirituall, when of things done in another County, or in another Kingdom; when of Eſtoppell, and where not; when of a mans intent*, &c.

Cap.

Cap. 11. fo. 137.

Concerning Evidence to be given a Jury. *What Evidence will* aintain *the* Iſſue, *and what not.* Of *witneſſes*, &c.

Cap. 12. fo. 154.

The Juries *Oath*; *Why called* ecognitors *in an Aſſiſe, and* Jurors a Jury. *Of the Tryall* per medietatem linguæ; *when to be* ayed, *and when grantable. Of a* ryall *betwixt two* Aliens, *by all* ngliſh. *Of the* Ven. fac. per edietatem linguæ, *and of* Challnges *to ſuch* Juries.

Cap. 13. fo. 164:

*The Learning of general Ver*icts, *ſpecial Verdicts, and Verdicts* open *Court*; *and where the* Inueſt *ſhall be taken by default*, &c.

Cap.

Cap. 14. fo. 210.

How the Jury ought to demean themselves, whilest they conside of their Verdict; when they may e and drink, when not; What mis demeanor of theirs will make th Verdict void; Evidence gi ve them, when they are gone from th Barr, spoyls their Verdict: For wh the Court may fine them, and when the Justice may carry them i Carts, till they agree of their Ver dict. An amendment affected by th Jury.

Cap. 15. fo. 224.

What punishment the Law ha provided for Jurors offending; taking reward to give their Ver dict. Of Embraceors. Deci tantum. ...taint: Several fin on Jurors. What Issues they forfe and of Judgment for striking a Ju ror in Westminster.

Cap

Tryalls per pais.

CAP. I.

The Derivation of the Word (*Jury.*) The Definition, Antiquity and Excellency of Juries, by way of Preface.

Jurie (Jurata) cometh of the French word (Jurer. i.e. Jurare.) And metonymically signifieth in Law, those 12 men who are sworn Judges in matters of fact, evidenced and debated, by Witnesses, before them: I call them Judges, because, as the Pleadings, of Serjeants and Counsellors at Law, do serve only Ad illustrandum; ('tis the property of the Court, Jus dicere.) So the testimony of Witnesses, only illuminateth the Question, 'Tis in the power

Vid. Cap. 12. Jurie.

power of the Jury to determine the fact, upon an Evidence Pro, and Con. According to those common Adages: Ad questionem Juris respondent Judices: Ad questionem facti respondent Juratores: Though, as the Judgment of the Court ought to be guided by the Law; So, is the Verdict of the Jury by the Evidence.

The Antiquity and excellency of Juries.

I will but only dip my pen into that fathomless depth of prayses which belong to the right use of Juries. Those silver drops which flow from their Eulogies, would soon drown (and so make barren) the most fruitful Author, even with redundancy of matter: Such showres must fall into the Ocean; they cannot be received, in such small rivulets, as I have contracted my self to. Their Antiquity proclaims them venerable, For (as (1.) Cook desires you) hear what the Law was before the Conquest. In singulis Centuriis Comitia sunto, atque liberæ conditionis viri duodeni ætate superiores, una cum præposito sacra tenentes juranto. &c. And Cambden (in his Britannia page 153.) Correcter Polidor

(1) Com. upon *Littleton*, fol. 155. v. d. lib. 3. 8. Preface.

Lamb. verb. Centuria.

Polidor Virgil, saying, Whereas Polidor Virgil writeth, that William the Conqueror first brought in the Tryall by 12. men, there is nothing more untrue; For it is most certain and apparant, by the Lawes of Ethelred, that it was in use many years before. &c.

Their generall use (being the only tryers of Choses in fait, almost in all Courts throughout England) speak them a publique good; And what answer shall I make to the Princes, vehementer Admiror. (3.) Videlicet, Wherefore are not Juries used in other Countries, if they are so good? But that of Forteſcue, the Learned, who best could tell, Scil. That other Countries can scarce produce one Jury, so well accomplished with Wealth and Ingeny, as one County, nay one Hundred, can in England. The use of Juries. (3) *Forteſcue*, cap. 28.

But not to dwell in the Porch of Florishes, I will addreſs my self to the Gravity of the Law, where you must not so much expect the flash of Rhetorick, as the light of Reason; No, the Law knowes best how to expreſs her

ſelf, in her own termes, wherefore all other Sciences muſt learn, with reverence, to keep their diſtance, And (as the Golden Finch (4) ſings) be glad to have their ſparks, raked up in her Aſhes.

(4) *Finch.* ca. 3.

And ſince an Iſſue is prævious, and the matter of a tryall, I ſhall firſt give you the deſcription thereof, and then touch upon the ſeveral Tryalls allowed by the Law, for diſcuſſion of the truth.

CAP.

CAP. II.

Of an Iſſue, and the divers ſorts of Tryals thereof: and when a Tryal ſhall be by a Jury, and when not; when by Certificate, when by Battail, and when by an Almanack; what Iſſue ſhall be firſt tryed, *Per Pais*; what ſhall be tryed by the Court; and what by Examination of the Attorney, Sheriff, *&c.*

ISſue, exitus, ſaith Cook (5) is a ſingle certain and materiall point, iſſuing out of the Allegations, and Pleas, of the Plaintiff and Defendant, conſiſting regularly upon an Affirmative, and Negative, to be tryed by 12 men; and it is twofold, Scil. either ſpeciall, as where the ſpecial matter is pleaded, or generall; as in Treſpaſs,

(5) 1. Com. fo. 126. Omnia unum aliquem ſortiuntur exitum, vel per patriam, vel per Judices terminandum. *Finch.* Epiſtle.

not guilty: in Assise, nul tort, nul disseisin, &c. And as an Issue naturall cometh of two several persons, so an Issue legall, issueth out of two several Allegations of adverse parties.

Tryall.

And to give you likewise his Definition of Tryall, It is to finde out, by due examination, the truth of the point in Issue or question betweén the parties, whereupon Judgment may be given; And as the question betweén the parties is twefold, so is the Tryall thereof; For either it is questio Juris, (and that shall be tryed by the Judges, either upon a demurrer, special Verdict or Exception, For Cuilibet in sua arte perito est Credendum, et quod quisque noverit in hoc se exercear. Or it is quæstio facti, And the tryall of the fact is in divers sorts; First, chiefly, and most commonly, by a Jury of 12 men, (of which kind of Tryall, my intention is principally to treat in this Book.) But because it is necessary to be known, that there are many wayes, allowed by the common-Law, to try matters of fact, besides this

Note, that upon a demurrer to part, and Issue to part, though it is the best way to give Judgment upon the *quæstio juris* first, yet the Court may try the *quæstio facti* first, at their discretion.

1 *Inst.* 72 125. *Iach.* 4.

this by Juries: I will here repeat some of them; And for this, first hear the Oracle, who tells you, (6) that he read of six kindes of Certificates, allowed for Tryalls, by the Common-Law.

(6) 1 Com. fol. 74.

1. The doing of service by him that holdeth by Escuage in Scotland, was to be tryed by the Kings Marshall of his Army, Per son Certificat en escript south son seal à serra mis a les Justices, saith Littleton. Tryalls by Certificate.

2. If it be alleadged in avoydance of an Outlawry, that the Defendant was in prison, at Burdeaux, in the Service of the Maior of Burdeaux, It shall be tryed by the Certificate of the Maior of Burdeaux.

3. For matters within the Realm, The Customs of London shall be Certified, by the Maior, and Aldermen. by the mouth of the Recorder. vide apres 17.

4. By the Certificate of the Sheriff, upon a Writ to him directed, in case

of Priviledge, if one be a Citizen or forreiner.

5. Tryall of Records, by Certificate of the Judges, in whose Custody they are by Law. All these be in temporall Causes.

6. In Causes Ecclesiastical, as loyalty of Marriage, generall Bastardy, Excommengement, Profession; These and the like are regularly to be tryed by the Certificate of the Ordinary. apres vide 16.

Records.

7. Matters of Record shall be tryed by the Record it self, and not per Pais. And for this Reason, in pleading of Letters Patents, the place need not be alleadged, where the Letters Patents were made, because the Defendant cannot plead nul tiel Record, but must plead, non concessit, and then the Jury shall come from the place where the Lands lie. Vide, li. 6. fo. 15. 1 Com. 117.260. Plo. Com. 231. But upon a Non est factum pleaded to a Deed, there must be a place alleadged where the Deed was made, because (though the

Why there needs no *visne*, where Letters Patents were made; otherwise in pleading Deeds.

the Deed, as to the matter of Law, be tryable by the Court, yet) the ſealing and delivery thereof, and other matter of fact, muſt be tryed by the Jury; ſo that in this caſe of a Deed, there is a Tryall per Pais, and by the Court. 1 Com. fo. 35. vide apres. 18.

Peers.

8. A Peer of the Realm, i.e. a Lord of the Parliament, ſhall upon an Indictment of Treaſon, or Felony, miſpriſion of Treaſon, and miſpriſion of Felony, be tryed by his Peers without Oath, 1 H. 4. 2. But in an Appeal at the Suit of the party, he ſhall be tryed per probos & legales homines Juratores. 10 E. 4. 6. &c. becauſe that is not the Kings Suit, but the parties. Vide, li. 9. 31. Le caſe del abbot de Strata Mercella. And in a Premunire, his Tryall ſhall be per Pais. Bolſtr. 1. part 198. Dutcheſſes, Counteſſes, or Barroneſſes, although married, ſhall be tryed, as Peers of the Realm are, but ſo ſhall not Biſhops and Abbots. Stam. 153. 20 H. 6. 9.

Cuſtoms of Courts, &c. tryed by the Judges.

9. The Cuſtoms and uſages of every Court ſhall be tryed by the Judges

Judges of the same Court, if they are pleaded in the same Court, ib. and many other things are tryed by the Judges, as the reasonableness of a fine of an offender. or upon surrender of a Copy-hold Estate; and so it is of Customes, Services, and also of the time that a Tenant at will shall have to carry away his Goods: And these Cases come under the Rule, which makes matter of Law to be tryed by the Judges; Vide 1 Com. fo. 56. And in some Cases matter of fact shall be tryed by the Judges, as if the Plaintiff appear by Attorney in Court, and then the Defendant pleads that the Plaintiff is dead; If one appeares, and saith, that he is the Plaintiff, whether he is, or not, shall be tryed by the Judges, li. 9. 30. So the non-age of an Infant, generally, and Maihme, by inspection of the Court. But in many Cases, Infancy shall be tryed per Pais, as if an Infant appear by Attorney, in Error, this shall be tryed per Pais, li. 9. 31. and so it is in an Estate probanda.

Bulstr. 1 part 131.

10. There

10. There are many Tryalls allowed by the Common Law, by Witnesses onely, without a Jury, as of the life and death of the Husband in Dower, so the proof of a Summons, or the Challenge of a Juror, must be tryed by Witnesses; and regularly, the proof ought to be by two or three Witnesses, 1 Inst. 6. and divers other things must be tryed by examination of the parties and Witnesses, as the Tryall by Wager of Law, &c. Finch 423. Tryals by Witnesses.

11. Duke or no Duke, Earl or no Earl, Baron or no Baron, shall be tryed by the Kings Writ. lib. 5. 35. lib. 6. 53. But Dutchess or no Dutchess, &c. by marriage, shall be tryed per Pais, because the marriage is matter of fact. Dukes, &c.

12. In a Plea del alien nee, the League between the King, and the Soveraign of the Alien, shall be tryed by the Record of the Chancery, for every League is of Record. lib. 9. 32. League.

13. If a Mannor be ancient demene, or not? It shall be tryed by the Book of Doomesday, which is in the Exchequer. Mannour.

quer. But whether certain Acres be parcel of such a Mannor, or no, it shall be tryed by the Country. ib.

Courts not of Record.

14. The proceedings of a Court, which is not of Record (as the County Court, the Hundred Court, the Court Baron, &c. shall be tryed by the Country, and not by the Rolls of the Court, because they are no Record. ib. Co. Lit. 117. b.

Wills and Administration.

15. Whether the Ordinary committed Administration to the Plaintiff, or whether the Testament was proved before the Ordinary; or whether such Will, be the Will of the party, or whether he dyed intestate, or not? In all these Cases, the tryall shall be per Pais, because probate of Wills, and Constituting Administrators, did not belong to Ecclesiastical Judges originally, but were given to them of late. But the tryall thereof is left to the Common Law, and was not given to them. lib. 9. 32. 40.

Plo. Com. 267. Special Bastardy.

16. In an Action upon the Case for calling one Bastard, the Defendant justified

stified that the Plaintiff was a Bastard; And it was awarded that this should be tryed per Pais, and not by the Ordinary, Hob. 179. Devant. 6. And so a plea that the Plaintiff was born at such a place before marriage, this is special Bastardy, and shall be tryed per Pais. Plo. 14. Dyer 89.

17. When an Issue is taken, whether a Custome or no Custome in London, If the Maior, Commonalty, and Citizens be parties or interessed in the Action, This Custome shall be tryed by a Jury, and not by the Certificate of the Maior and Aldermen, by the Recorder. Hob. 85. Day and Savadges Case. Devant. 3. Stiles 137. Moor 871. vide pres tit. Visne. Customs of *London.*

18. A matter of Record being mixt with a matter of fact, shall be tryed per Pais, and not by the Record. Hob. 44. Peter and Staffords Case. Devant. 7. Matter of Record, mixt with matter of Fact.

19. In Writs of Right, and Appeals that touch life, Tryall may be by Battail, or by Jury, at the Defendants Tryalls by Battail.

dants choice; The Battaile, in a Writ of Right, must be by Champions, (who must be Freemen.) But in an Appeal it must be in proper person. The Champions, in a Writ of Right are not bound to fight longer than until the Starrs appear; and if the Champion of the Tenant can defend himself untill then, the Tenant shall prevail: The Judges of the Court of Common Pleas, are Judges of the Battel, in a Writ of Right; and the Judges of the Kings Bench in an Appeal of Felony; It seems they seldom or never killed one another in this tryall of Battel, for their Weapons were but Batoones, and he that was vanquished, was presently upon Proclamation made, to acknowledge his fault, in the Audience of the People, or else to cry Cravent in the name of Recreantise, &c. and upon this, Judgment was to be given, and after this the Recreant should amitte liberam legem, that is, should become infamous, &c. 2 Institutes 247. Fitz. 421. lib. 9. 21. Mirror of Justice 161, 162, &c. 1 Inst. 294.

20. I

20. In a Writ of Diſceit, upon a Recovery by default, The Tryall ſhall be, If the Judgement was given upon the Petit Cape, by the Summoners, If upon the Grand Cape, by the Summoners, per nors, or veiors, and not per Pais; So if a Recovery by default in a reall Action be pleaded, to which the other ſaith, Nient Compriſe, this ſhall not be tryed per Pais, but by the Summoners and Veiers, lib. 9. 32. Recovery by default. Nient Compriſe.

21. In debt upon a ſimple Contract, Detinue, &c. The Tryal may be by Wager of Law, or per Pais, at the Defendants Election. But when the Defendant wageth his Law, he ought to bring with him eleven of his Neighbors, who will avow upon their Oath, that in their Conſciences he ſaith true, ſo as he himſelf muſt be ſworn de fidelitate, and the eleven de Credulitate. Ib. Finch 423. and 1 Inſt. 295. you may read excellent Learning concerning this Tryall. Wager of Law.

22. If Profeſſion be denyed, it ſhall be tryed by the Court Chriſtian; But if the time of the Profeſſion be in Iſſue, this Profeſſion.

this shall be tryed by the Country. lib. 4. 71. So though an Inrollment, or other matter of Record, cannot be tryed per Pais, yet the time when the Inrollment was made, may be tryed per Pais. So whether the party appeared in such a Court, or on such a day, &c. shall be tryed per Pais. Cro. 3. part. 131. So whether one was Sheriff such a day or not. Cro. 1. part. 421.

Inrollment.

Appearance.

Sheriffe.

Admission, &c. Admission, Institution, Plenarty, and Ability of the Parson, shall be tryed by the Bishop. But Induction shall be tryed by the Country, and so shall Avoydance by resignation. Dyer 229. Moor 61. and voyd, or not voyd shall be tryed per Pais, 1 Inst. 344. And Plenarty, if the Clerk be dead, Mirror of Justice 324. li. 6. 49. The Cause of refusal of a Clerk by the Bishop, shall be tryed by the Metropolitane, if the Clerk be living; but per Pais, if he be dead. l. 5. 58.

Plenarty.

Lib. 6. 49.

Ideocy. 22. An Ideot, found so from his Nativity by Office, may come in person in the Chancery, before the Chancellor, and pray that before him, and such Justices or Sages of the Law, whic

which he shall call to him (who are called the Councel of the King), he may be examined, whether he be an Ideot, or no; or by his friends he may sue a Writ out of Chancery, returnable there, to bring him into the Chancery, Ibidem Coram nobis, & concilio nostro examinand. lib. 9. 31.

24. If it be in question, whether the Sheriff made such a return or not, It shall be tryed by the Sheriff: if whether the Undersheriff made such a Return or not, it shall be tryed by the Undersheriff; If the question be, whether such a one be Sheriff, or not, It shall be tryed by the Examination of the Sheriff, yet he is made by Letters Patents of Record, and therefore it may be tryed by the Record. ib. Cro. 2. part. 421. Sheriffe.

25. If an Approver say, that he Commenced his Appeal before the Coroner per dures, this shall be tryed by the Record of the Coroner; and if it be found that he did it without dures, he shall be hanged, ib. Corone br. 75. Dures.

Statute. 26. The Tryall, whether a Statute shewed before, be the true Statute or not, shall be by the Examination of the Maior, and Clerk of the Statutes, which took the Statute, and not per Pais, ib. whether a Statute hath two Seals or not, shall be tryed per pais, Leon. 1 part. 228, 229.

Escheator. 27. In Assise the Tenant said, that the Lands were taken into the Kings hands, this shall be tryed by the Examination of the Escheator.

Certificate. 28. If one in avoydance of an Outlawry, alledge that he was in Prison at Burdeaux, ultra mare in servitio Majoris de Burdeux, this shall be tryed by the Maior's Certificate; and in such like Messenger. Cases, other Tryals shall be by the Certificate of the Marshall of the Host, and by the Captain of Calice, and also by Messenger, of a thing done beyond Sea. Ib.

Petit Cape. 29. At the Petit Cape, the Tenant said that he was imprisoned 3. days before the default, and 3. days after, this shall be tryed by the Examinatio[n]

of the Attorney; Nient Attach. per 15. jours in Assize shall not be tryed per pais, but by examination of the Bayley. Ib. Bayley.

30. It seems an Almanack is so infallible, that it hath countervailed the Verdict of a Jury, For in Error of a Judgment given in Lynne, The Error assigned was, that the Judgement was given at a Court held there on the 16th day of February, 26 Eliz. and that this day was Sunday, and it was so found by Examination of the Almanacks of that year, upon which it was ruled, that this Examination was a sufficient Tryall, and that a Tryall per pais, was not necessary, although it were an Error in Fact; and so the Judgment was reversed. Cro. 1 part. last pub. fo. 227. Almanack.

31. In ancient times there was a Tryall in Tryminall Causes called Ordalium, for upon Not guilty pleaded, the Defendant might put himself upon God and the Country (as is the use at this day) or else upon God only, Ordeale.

and then if he was a Freeman, he was to be tryed per ignem, that is, he was to passe over Noven vomeres ignitos nudis pedibus, and if he was not hurt by this, then he was to be acquitted, otherwise condemned: and this was call'd Judicium Dei; But if he was a slave, then his Tryall was to be per aquam, and that divers wayes, which all appear in Lambard, verbo Ordalium. From which kinde of Tryall, I presume we still retain this expression of an innocent person, That he need not feare fire or water: This manner of Tryall was first prohibited by the Cannons, then by Parliament: The Tryall by Battail is likewise prohibited by the Cannons, but not by Parliament, as you may read in the ninth Report, fo. 32. and in the Authorities there cited, which I therefore omit to recite here, (though I have the Books by me) and so in this whole Treatise, where I refer you to a Book, I shall not set down the Authorities cited in that Book, which will avoid prolixity.

Battail.

32. When

32. When the matter alleadged, extendeth to a place at the Common Law, and a place within a franchise, it shall be tryed at the Common Law. 1 Inst. 125.

Which Tryall shall be first.

33. All matters done out of the Realm of England, concerning War, Combat or Dæds of Arms, shall be tryed and termined before the Constable and Marshall of England, before whom the Tryall is by Witnesses, or by Combate, and their proceeding is according to the Civil Law, and not by the Oath of 12. men, 1 Just. 74. 261. Wherefore if the Kings Subject be killed by another of his Subjects in any forraign Country, The Wife or Heir of the Dead, may have an Appeal before the Constable and Marshall, who sentence upon the testimony of Witnesses or Combat. ib. So if a man be wounded in France, and dye thereof in England. ib.

Martiall Affairs.

Witnesses or Combat.

It is worthy our observation, to take notice when there are several Issues, which of them shall be first tryed;

What Issue shall be first tryed.

And for this you have already heard, that where Issue is joyned for part, and a Demurrer for the Residue, the Court may direct the Tryal of the Issue, or judge the demurrer first, at their pleasure, though by the opinion of Doderidge. It is the best way to give Judgement upon the Demurrer first, because when the Issue comes afterwards to be tryed, the Jury may assess damages for the whole.

Latch. 4.

Damages.

Plea to the Writ.

In an Action against two, the one pleads in abatement of the Writ, the other to the Action; the Plea to the Writ shall be first tryed, for if that be found, all the whole Writ shall abate, and make an end of the business; for the Plaintiff ought not to recover upon a false Writ. 1 Inst. 125.

Plea to the whole, first tryed.

In a Plea personall against divers Defendants, the one Defendant pleads in barr to parcel, or which extendeth, onely to him that pleadeth it; And the other pleads a Plea which goeth to the whole: the Plea, that goeth to the whole, (that is) to both Defendants,

dants, shall be first tryed, because the other Defendant shall have advantage thereof; For in a personall Action, the discharge of one, is the discharge of both.

As for example if one of the Defendants in Trespass, pleads a Release to himself (which in Law extends to both) and the other pleads not guilty, (which extends but to himself:) or if one pleads a Plea which excuseth himself onely, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole shall be first tryed; for if that be found, it maketh an end of all: And the other Defendant shall take advantage hereof, because the discharge of one, is the discharge of both. But in a Plea reall it is otherwise, for every Tenant may lose his part of the Land; As if a Præcipe be brought as Heir to his Father against two, and one pleads a Plea which extendeth but to himself, and the other pleads a Plea which extends to both, as Bastardy in the Demandant, and it is found for him, yet

Release.

Discharge of one dischargeth both.

the other Issue shall be tryed; for he shall not take advantage of the Plea of the other, because one Joyntenant may lose his part by his misplea. ib.

CAP. III.

Of a *Venire facias*; To whom it shall be directed; when to the Sheriff, when to the Coroners, when to Esliors, and when to Bayliffs.

Having given you the Epitome of what Tryals are allowed by the Common Law, and what shall be tryed per pais, and what not; we shall now apply our selves more particularly to the Tryal by Juries: And because a Venire facias is the foundation and Causa sine qua non, of a Jury, (I meane in Civil Causes; for in Criminalls, as upon Indictments, the Justices of

of Goal Delivery, give a general Command to the Sheriff, to cause the Country to come against their coming; and take the Pannels of the Sheriffe without any process directed to him, yet process may be made against the Jury, though it is not much used. Stamford, Plees del Corone, 155.) I will first recite the Writ, in terminis, the rather, because I intend to order my Discourse, according to the method of the Writ.

Rex &c. Vic. B. Salutem. Precipimus tibi quod venire facias Coram Justiciariis nostris de Banco apud Westm. *tali die, duodecem liberos & legales homines de vicenet. de* C. *Quorum quilibet habeat quatuor libras terre, tenement. vel reddit. per annum ad minus, per quos rei veritas melius sciri poterit; Et qui nec* D. E. *nec* F. G. *aliqua affinitate attingunt; Ad faciend. quandam Jur. patrie inter partes predict. de placito, &c. quia tam Idem* D. *quam predict.* F. Venire facias.

inter

inter quos inde contentio eſt poſuer. ſe in Jur. illam. Et habeas Ibi nomina Jur. illorum & hoc breve T. *&c.*

This is one of thoſe Latine Letters, (as Finch termes them, fo.237.) which the King ſends with Salutation, to the Sheriff. But withall Commands him, that he cauſe to come twelve frée and lawful men of his County, to reſolve the queſtion of the fact, in diſpute betwæn the parties, upon the Jſſue; and it is a Judicial Writ, iſſuing out of the Record, for Plaintiff or Defendant, after they have put themſelves upon the Country: for upon the words Et de hoc ponit ſe ſuper patriam, by the Defendant, Or, Et hoc petit quod Inquiratur per patriam, by the Plaintiff, and Jſſue joyned thereupon, the Court awardeth the Venire facias, vid. Ideo fiat inde Jurat.

Sheriff. And firſt, you ſée it is directed Vice Comiti, i.e. to one who is Vice Comitis, and hath the Regiment of the County, inſtead of the Earl of that County, to whom once it did belong: As we are taught

aught in the Mirror, Chap. 1. Sect. 2. cil. That it appeareth by the Ordinance of ancient Kings before the Conquest, That the Earls of the Counties had the Custody or Guard of the Counties; and when the Earls left their Custody or Guards, then was the Custody of Counties committed to Viscounts, who therefore are called Vice Comites.

What great Repose and Trust both the King and Laws put in this great Officer, The Oracle tells you, 1 Inst. 168. That he is Shireve, that is, præfectus Comitatus, Governour of the County; For the words of his Patent be, Commissimus vobis Custodiam Comitatus nostri de, &c. And he hath a threefold Custody, triplicem Custodiam, viz. first, Vitæ Justiciæ, for no Suit begins, and no Proces is served but by the Sheriff, And he is to return indifferent Juries for the tryall of mens lives, Liberties, Lands, Goods, &c. Secondly, Vitæ Legis, he is after long Suits, and chargeable, to make Execution, which is the life and soul of the Law. Thirdly, What Trust in the Sheriff.

ly, Vitæ Reipublicæ, he is Principal Conservator pacis, within the County which is the life of the Commonwealth, for Vita Reipublicæ Pax.

To whom the Venire facias ought to be directed.

Yet notwithstanding the height and Latitude of this great Office power and trust, The Law adjudg him in many Cases not capable, to so much as return a Jury; For if he be of kindred by nature, or of affin by Marriage to any of the parties, (that I may say all, in a little,) if he not as indifferent almost in all respe he is, whom the Law allows to be

Coroners.

Juror, he ought not to meddle with t returning of the Jury. But the Veni facias shall be directed to the Corone (or to some of them, if the residue a not indifferent) who in that Case a vice, Vice Com. And if the Corone

Fortescue, cap. 2. 5.

are not indifferent, then the Veni shall be directed Ad 2 Electores, th is, to two whom the Court shall ch and deeme fit to return the Jury; A

Esliors.

to the return of these Elisors or Esliors ab Eligendo, no Challenge will be a

Challenge.

mitted. Bro. tit. Venire facias 14. as

the Array; But to the Polles, 1 Inſt. 158. If one of the Sheriffs of London be a party, then the Venire may be directed to the other Sheriff, If the Under Sheriff be a party, yet the Venire may be directed to the Sheriff, with this Proviſo. Quod ſub Vic. tuus in nullo ſe intromittat cum executione illius brevis. 18 E. 4. 3. Sheriff of *London*.

Judicial Writs (ſay Cook and Sanders, Plo. 74.) may be directed to the Coroners; As the Venire facias, where the parties are at Iſſue; there, upon the ſurmiſe of the Plaintiff, that the Sheriff is his Cozen, and upon prayer that the Venire be directed to the Coroners, for avoydance of his own delay that might happen by the Challenge of the Array, The Defendant ſhall be examined whether it be true, or not, and if he confeſs it, then the Venire ſhall be awarded to the Coroners; for then it appeares to the Court by the Defendants confeſſion that the Sheriff is not indifferent; But if the Defendant denies it, then the proceſs ſhall be awarded to the Sheriff, becauſe the Coroners. Examination.

Sheriffs

Sheriff's Authority and profit shall not be taken away, without cause apparant to the Court; But if the Defendants will alledge any such matter, and pray a Venire facias to the Coroners, there the Plaintiff shall not be examined, neither shall such allegations be allowed, because delayes are for the Defendants advantage, and the Defendant may challenge the Jury for this cause, and so is at no prejudice.

The Defendant may not have a *Venire facias* to the Coroners.

And see in term. H. 3. H.7. fo.5. placit. ult. In a quare Impedit, where the Defendant shewed how the Sheriff was Cozen to the Plaintiff, and prayed a Writ to the Coroners, but it was denyed him upon the same Reason. Fitz. tit. suggestion placit. 8. br. Challenge 153.

When the Process is once awarded to the Coroners, for a default in the Sheriff, if there be a new Sheriff made afterwards, who is indifferent, yet the Process shall not revert, but continue to the Coroners pendant le plea, 14 H.7. 31. bro. tit. Venire facias

Venire facias once directed to the Coroners, shall not be to the Sheriff afterwards.

facias. 17. So the Entry is, Ita quod Vice comes se non intromittat. 18 E. 4. 3.

Sheriff shall not return the *Tales*, where he cannot the *Venire facias*.

And therefore where the Sheriff ought not to return the Venire, he cannot return the Tales; For in Error in the Exchequer Chamber of a Judgement in the Queen's Bench, the Error assigned was, because the Venire facias was awarded to the Coroners, for Consanguinity in the Sheriff; and it was returned by the Coroner, And afterwards a Tales was awarded, and it was returned by the Sheriff, and it was tryed, and a Verdict given, and Judgment. And for this cause held to be Erroneous, and not aided by the Statute of 32 H. 8. or 18 Eliz. Wherefore the Judgement was reversed. Cro. 1 part. ult. pub. 574. bro. tit. octo. tales 9.

I will instance one Case more in the same Reports, fo. 586. because it is very full in the point. After Issue in Trespass, the Plaintiff for his expedition surmised, that he was Servant to the Sheriff, which being confessed by the Defendant, the process was awarded

Where the Coroner returns the *Venire facias*, he ought to return the *Tales*.

ded to the Coroners, and after Verdict, it was moved in Arrest of Judgement, that the Tales de Circumstantibus was awarded, and returned by the Sheriff; which was held by the whole Court to be good cause for Staying the Judgment: For it is a mis-tryall, not aided by any of the Statutes; for process being once awarded to the Coroners, the Sheriff afterwards is not the Officer to return the Jury, no more than any other man. And process ought alwayes to be returned by him, who is an Officer by Law to return it, otherwise it is meerly void: But afterwards upon view of the Record, it appeared that the Tales was returned by the Coroners, and their names annexed thereto, wherefore it was without further question. But the Court said, if their names had not been annexed to the Tales, yet it had been well enough; for they be annexed to the first Pannel. And it shall be intended, that the right Officer returned it, and the usuall course is, That to such Tales there is not any Officers names subscribed, and yet it is good enough; for it is not

No name to the Return.

with-

within the Statute of York, which appoints that the name of the Sheriff should be subscribed; But it was moved, that the Record of the Postea is, that the Tales were returned by the Sheriff; But the Court held, that it was amendable, and it was done accordingly, and the Plaintiff had Judgment.

But if the Venire be awarded to the Coroners, for default in the Sheriff, and they do nothing upon the Writ, then I suppose, upon a default discovered in the Coroners, de puisne temps, the party may shew this to the Court, and have a Venire awarded to the Sheriff, (if there be an indifferent one made in the mean time) or else to Elisors, & sic e converso.

Venire facias to the Sheriff, after one awarded to the *Coroners*.

In Error of a Judgment in Chester, the parties being at Issue, a Venire was awarded to the Sheriff. And at the day of the Return, it was entred Quod Vice comes non misit breve. And then the Plaintiff

Venire facias to the *Coroners*, after one to the Sheriff.

prayed a Venire facias, to the Coroners, for Cousinage betwixt him and the Sheriff; which was awarded accordingly, and at the day of Tryall, the Defendant made default, and thereupon, Judgment. Error was assigned, because the after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a Venire facias to the Coroners, without some cause de puisne Temps, sed non allocatur, because there was nothing done upon the first Writ. And the Defendant having made default, it was immaterial. Cro. 1 part. ult. pub. 853.

No *Venire facias* to the *Coroners*, after one to the Sheriff.

But the Defendant might have demurred to this Prayer; For if the Plaintiff pray a Venire facias to the Sheriff, he shall not challenge the array, nor have a Venire afterwards to the Coroners, because the Sheriff is his Cozen, or for any other principall Challenge whereof he might by common intendment have Conusance, when he so prayed the Venire facias; for upon shewing this Cause at first, he might

night have prayed Proces to the Coroners; But for a principall Challenge, of which by common intendment, the Plaintiff could not know at the first, as that the Defendant is of kindred to the Sheriff, &c. he may afterwards challenge the array, when they appear, or if the Sheriff doth nothing upon the Writ, he may pray a new Venire to the Coroners. 15 H.7.9.

If the Plaintiff prayes a Venire facias to the Coroners, because he is of kindred to the Sheriff, if the Defendant will not confess this, but denyes it, this shall be entred, and the Defendant shall not challenge the Array for this Cause afterwards. br. tit. Venire facias 21. and 23.

If the Defendant denies the Plaintiffs suggestion, he shall have no benefit of it by Challenge.

If a Venire facias be awarded to the Coroners, where it ought to be to the Sheriff, or the Visne cometh out of a wrong place, yet if it be per consensum partium, and so entred of Record, it shall stand, for omnis consensus tollit errorem. 1 Inst. 126.

By Consent, the *Venire facias* may be directed to a wrong Officer.

Mistryall without such consent.

li. 5. 36. But if it be directed to the Coroners, where it ought to be to the Sheriff, without such consent of parties: This is an insufficient Tryall, not remedied by any Statute, except it be upon an insufficient suggestion, and then the Statute of 21 Jac. 13. helps it.

Venire facias to some of the Coroners.

Upon suggestion that the Plaintiff and the Sheriff, and one of the Coroners are of kindred to the Plaintiff, or Defendant, or upon any other suggestion which contains a Principall Challenge, the Venire facias may be directed to the other Coroners. Dier. 367.

Bayliffs.

Error of a Judgment in Northampton, because in Northampton the Court being held before the Maior and two Bayliffs, the Venire facias upon the Issue was awarded to the two Bayliffs, to return a Jury, before the Maior and Bayliffs, Secundum Consuetudinem: which being returned, and Judgment given the Error assigned was, because the

Bayliffs

Bayliffs being Judges of the Court, could not alſo be Officers, to whom Proceſs ſhould be directed, there being no Cuſtome that can maintain any to be both Officer and Judge. But all the Court (abſente Hide) conceived it might be good by Cuſtome. And that it is not any Error, for the Judges be not the Bayliffs onely, but the Maior and Bayliffs; and it is a common courſe, in many of the Antient Corporations, where the Bayliffs are Judges, or the Maior and they be Judges; yet in reſpect of executing Proceſs, they be the Officers alſo. And one may be Judge, and Officer diverſis reſpectibus, as in Redifſeiſin, the Sheriff is Judge and Officer: Whereupon Judgment was affirmed. Cro. 1 part. 138.

Judge and Officer to return Writs.

In Treſpaſs and Aſſault laid in the Court, to beat the Palace of Weſtm. It was adjudged, that the Venire facias ſhall iſſue al Garden del Palice, and not to the

Venire facias to the Garden of the Palace of *Weſtminſter.*

Sheriff of Middlesex. Bro. tit. Ve fac. 31.

CAP. VI.

What faults in the *Venire fa cias* shall vitiate the Tryal what not, when a *Venire fa cias de novo*, shall be award ed; when severall *Ven. fa* When the *Venire facias* sha be betwixt the party and stranger to the Issue; Wh may have a *Venire facias* b *Proviso*, and when.

Venire facias, why the Writ so called.

WE have now shewed you t what Officer the Veni facias shall be directed; The ne step in the Writ is Precipimus ti quod Venire facias, Which word Venire facias, are the most effectua words in the Writ, and therefo they give the denomination to th whole

whole Writ. And here opportunity is offered us, to ſpeak ſomething of a Venire facias in generall. I am not ignorant how our Bookes ſwarm with Caſes which ariſe from the defects in this Proceſs, and how that Verdicts have been ſet aſide, Judgments ſtayed, and reverſed, for want of ſufficient Returns, miſawarding, diſagreement with the Rolls, diſcontinuance, and many other faults in this Writ. But the Statutes of Jeofailes (eſpecially the Statute 21 Jacob. cap. 13.) have pardoned (as I may ſo ſay) theſe enormities; As, the awarding this Writ, hab. Corpora, or diſtringas to a wrong Officer, upon any inſufficient ſuggeſtion, or by reaſon the Viſne is in ſome part miſawarded or ſued out of more places, or of fewer places than it ought to be, ſo as ſome place be right named, The miſnaming of any of the Jury, either in Sur-name, or addition of any of the ſaid Writs, or in any Return thereupon, ſo that upon examination, it be proved to be the ſame man that was meant to be re-

Statute of *Jeofailes.* 21 *Jac.* 13.

turned; or if no Return be upon any of the ſaid Writs, ſo as a Pannel of the names of the Jurors be returned, or annexed to the ſaid Writ; or if the Sheriff or Officers name, having the Return thereof, is not ſet to the Return of any ſuch Writ, ſo as upon Examination, it be proved that the ſaid Writ was returned by the Sheriff, or Under-Sheriff, or ſuch other Officer. In all theſe Caſes, the Judgment ſhall not be ſtayed, nor reverſed for theſe defects.

But this Act doth not extend to any Writ, Declaration, or Suit of Appeal of Felony, or Murther, nor to any Indictment, or Preſentment of Felony or Murther, or Treaſon; nor to any Proceſs upon any of them; nor to any Writ, Bill, Action, or Information upon any popular, or penall Statute: Wherefore ſince Informations, and popular Actions are grown ſo frequent, the Attorneys, &c. herein had beſt beware of theſe Jeofailes.

Popular Actions, &c.

By

By this Statute, many defects are remedied, which were not by the Statutes of 32 H. 8. Cap. 30. and 18 Eliz. Cap. 14. yet all are not; for this Act onely helps the mis-naming of a Juror, in Sur-name, or addition, and saith nothing of his Christian name: wherefore I conceive the Law in Codwells Case, in the fifth Report, remains as it was then; which is, that if a Juror be mis-named in his Christian name, on the Venire, though he be named right in the Distringas, and Postea, yet this is ill, and not amendable; and with this agrees, Goddards Case, Cro. 2. part. 458.

Christian name mistaken in the *Venire facias*, incurable.

And since the Court (Cro. 1 part. fo. 203.) doubted thereof, I may well put the Question, if a Juror be right named upon the Venire, and mis-named in his Christian Name, in the Distringas, &c. whether this is amendable, or not; without dispute, it is not by the Statute 21 Jacob, for that onely helps the Sur-name. But with Reverence to

Christian name right in the *Venire facias*, and wrong in the *Distringas*.

to the Courts doubt, I conceive clearly, it is holpen by the Statutes of 32 H. 8. and 18 Eliz. as a discontinuance of Proces; and I may with the more confidence believe it, because in Codwells Case aforesaid, where in the Pannell of the Venire, a Juror was named Paulus Cheale, and in the Distringas, &c. he was right named Paulus Cheale, and so because he was mis-named in his Christian Name, in the Venire, Judgment was arrested. But it is there adjudged, that if he had been well named on the Venire, and mis-named upon the Distringas or Postea, then upon Examination, it should be amended. But the Countess of Rutlands Case, lib. 5. 42. is expresse in the point, and so is Cro. 3. part. 860.

And it is to be known, that in most Cases, where the Venire facias, Hab: Corpora, or Distringas be defective, they are to be amended; but if the Malady be so fatall in the Venire, that it causes a Mistriall, (as in

in the miſtake of a Jurors Chriſtian Name, or where a Juror not returned is ſworn, &c.) then the Verdict is to be ſet aſide, and a Venire facias de novo, to be awarded; and ſo was it to be upon thoſe miſtakes, (now amendable by the Statutes,) before the making thereof. And where a Jury giveth a Verdict which is accepted, and recorded by the Court, be the Verdict perfect or imperfect, the Jurors are diſcharged, and ſhall never try the ſame Iſſue again upon a new Niſi prius. But if the Verdict be ſo imperfect, that Judgment cannot be given upon it, then the Court ſhall award a Venire facias, de novo, to try the Iſſue by other Jurors. li. 8. 65. Bulſtr. 2 part. 32.

Venire facias de novo.

One Jury ſhall not try a cauſe twice.

In Yelvertons Reports, fo. 64. the Caſe is, That a Venire facias was made Vice-Comiti, (leaving out) Salop, for which there was a blanck left in the Writ. But re vera, it was returned by the Sheriff of Salop. In Arreſt of Judgment it was alleadged, that the Venire facias

Album breve, the County left out in a *Venire facias.*

facias was vitious for this cause; But Gawdy said it should be amended, And by Fenner and Williams, It is as no Writ, because it is not directed to any Officer. And then it is ayded by the Stat. of Jeofailes, For it might rather be called a blanck, then a Writ, because it was directed to no Officer.

Severall *Venire facias.*

In Cases where there are severall Defendants, who plead several Pleas, the Plaintiff may chuse either to have one Venire facias for all, or severall, for every one of the Defendants; But (if you will be ruled by Stamford) the surest way is to have a Venire facias against every one, and then one cannot have benefit of the others Challenge: neither shall the death of one abate the Venire facias against the other; (This he speaks of in Appeals) but if the Court once award a joint Venire facias, you cannot have severall Venires afterwards, though there be nothing done upon the first; except

except it be upon matter de puiſne Temps, as the death of one of the Defendants, &c. li. 8. 66. li. 11. 5. 6. Stamf. 155. bro. tit. Venire facias 2. 35.

But now it is the uſuall courſe to have but one Venire facias, upon ſeverall Iſſues, though againſt ſeverall Defendants, Cro. 3. part. 866. hob. 36. 64. And ſo uſuall, that the Court declared, Cro. 2. part. 550. That there never ſhall be ſeverall Venire facias to try ſeverall Iſſues in one County; For what need the Plaintiff trouble himſelf, and the Country, with ſeverall, when one Jury will ſerve his turn: Et fruſtra fit per plura quod fieri poteſt per pauciora. But otherwiſe, if it be in two Counties. Cro. 3. part. 866.

One *Venire facias* in ſeverall Iſſues.

After Iſſue joyned by two Defendants, if one of them die, and then a Venire facias is awarded betwixt the Plaintiff. and both the Defendants, and ſo in the Hab: Corpora and Diſtringas, yet this ſhall not vitiate

Venire facias between the Plaintiff and 2. Defendants where one is dead.

vitiate the Venire facias, &c. to make Error, because though one of the Defendants be dead, yet the other being alive, it is sufficient. And there needs be no surmise in Judiciall Writs, that one of the Defendants is dead; It is time enough to shew it to the Court at the day in bank. Cro. 1 part. 4. 26. But if there be two Defendants, and the Venire facias be but against one of them, 'tis Error, 7 H. 4. 13. and bro. tit. ven. fac. 11. Cro. 1. part. 426.

No surmise in Judicial Writs of death in one of the parties.

If the Venire facias beares date before the Action brought, or varies from the Roll, yet it is aided by the Statutes of Jeofailes. Cro. 1. part. 38. 90, 91. 203, 204. Miscontinuance or discontinuance, or misconveying of Process, is ayded by 32 H. 8. 30. The want of any Writ Originall or Judiciall, defaults in their form, and insufficient Returns thereupon, are ayded by 18 Eliz. 14. Cro. 3. part. 259. But you must have a care the Venire facias be not faulty in any other matters of Substance; for if the parties

Venire facias dated before the Action brought.

Jeofailes.

parties names be miſtaken, or the Iſſue, as if the Iſſue be ne unques Executor, and the Venire facias be in placito debiti, &c. this is a Miſtryall. Cro. 2. part. 528. So it is, if the Venire facias be in placito tranſgreſſionis, where the Action is in placito tranſgreſſionis, & ejectionis firme. This miſawarding of Proceſs is not ayded by any of the Statutes, and better it was, that there had bèn no Venire facias at all in ſuch a Caſe; for then the Statutes would have holpen it. Cro. 3. part. 622.

Parties names miſtaken in a *Venire facias.*

Miſtryall.

No Venire facias holpen.

In ſome Caſes a Venire facias ſhall be awarded to make an Enqueſt betwixt a ſtranger to the Writ and Iſſue, and the party. I will inſtance but in one, and that is upon the Statute of Weſtm. 2. cap. 6. If a Tenant being impleaded vouch to warranty and the Vouchée denieth the Dèed, or other cauſe of the Warranty, &c. That the Demandant may not hereby be delayed, he may ſue out a Venire facias

Venire facias between a party and a ſtranger.

facias to try the Iſſue between the Tenant and Vouchée.

Inqueſt at whoſe requeſt.

Inqueſts in Pleas of Land, ſhall be as well taken at the Requeſt of the Tenant, as of the Demandant. 2 E. 3. cap. 16. If the Plaintiff, or Demandant, deſiſteth in proſecuting his Action, and bringeth it not to Tryall, then the Defendant, or Tenant may ſue forth a Veni. facias with a Proviſo, which is to no other end, but that the Sheriff ſhould ſummon but one Jury, if the Plaintiff alſo ſhould have brought him another Writ, to the ſame purpoſe; And although, (as my Lord Dyer ſaith, fol. 215.) the granting of this Venire facias, &c. with a Proviſo, depends much upon the diſcretion of the Court, yet for the greater part, it is not grantable for the Defendant, unleſs when he is actor as well as the Plaintiff, or unleſs there be a default, and Laches in the Plaintiff; therefore there can be no Tryall by Proviſo againſt the King (unleſs with the Attorney

Venire facias by Proviſo.

Generall's

Generall's consent,) because no default, or Laches can be imputed to the King: But an avowant in Replevin, may have a Venire facias with a Proviso, immediately after Issue joyned, because he is actor, and in nature of the Plaintiff.

Proof presently after Issue joyned.

But note the Nota (in Stamford's Pleas, del. Coron. fol. 155.) That if by negligence of the Plaintiff, the Defendant sues a Venire facias with a Proviso, yet the Plaintiff may at his pleasure stay the Defendant, that he shall not proceed in his Process; in praying a Tales, upon the Defendants Proces, as it appeares T. 15 H. 7. fol. 9. And the Defendant shall never be received to persue this Process with a Proviso, so long as the Plaintiff persues, or is ready to persue, as appears, Mich. 14 H. 7. fol. 7.

How the Plaintiff may stop the Defendants Proviso.

And seeing the Tales men offer themselves to us, we will tell them upon what accompt they come, before they thrust themselves into the

Tales men.

Inquest, commonly for the love of eight pence; but it may be, to do some of their Neighbours a shrew turn.

CAP. V.

Why the *Venire facias* runs to have the Jury appear at *Westminster*, though the Tryall be in the Country. Of the Writ of *Nisi prius*, when first given, when grantable, when not, and in what Writs. Of the *Tales* at Common Law, and by Statute. When the Transcript of the Record of the *Nisi prius* differs from the Roll, whereby the Plaintiff is non-suited, he may have a *Distringas de novo*.

But to observe the Method of the Writ, the next words are Coram

Coram Justiciariis nostris de Banco apud Westminst. tali die. And here first of all, you may ask me to what purpose the Sheriff is commanded to cause the Jury to come to Westminster, when they are to try the Cause in the Country, and in truth are not to come to Westminster. I must confess the resolution of this question is not unnecessary: wherefore we must know, that originally, before the Writ of Nisi prius was given, the purpose for which the 12. men were to be summoned upon the Writ of Venire facias to come to Westminster, was, that contained in the Writ, videl. Ad faciend. quandam Juratam; for then was the Tryall intended to be there, if a full Jury appeared; if not, then a Hab. Corpora, (with a Tales sometimes annexed to it, the form whereof you may see in the Register) and if they did not appear at the Return in the Hab. Corpora, then went out the Distringas. This I speak of the Common Pleas: But the course of the Kings Bench, and Exchequer, is,

Why the *Venire facias* is to have the Jury appear at *Westminster*.

Hab. Corpus.

Distringas.

after the Venire facias, to have a Distringas, leaving out the Hab. Corpora. Tryals then were all at the Barr. (I speak not of Assizes.) But now, because Jurors did not use to appear upon the Venire facias, it being without penalty; Tryals at the Barr, are appointed upon the Hab. Corpora, and Distringas, because the Jury will more certainly appear at the day in the Distringas, through fear of forfeiting Issues: which the Sheriff returns on the Distringas, not on the Venire facias. By the Statute of 18 Eliz. cap. 5. No Jury shall be compelled to appear at Westminster, for the Tryal of an offence (upon any penall Law) committed above 30. miles from Westminster, except the Attorny Generall can shew reasonable cause for a Tryal at Barr.

Tryals at Bar.

Where a Jury is not compellable to appear at *Westminster*.

Thus it was at Common Law, before the giving of the Writ of Nisi prius, when all Jurors, together with the parties, came up to the Kings higher Courts of Justice, where

where the Cauſe depended; which (when Suits multiplyed) was to the intolerable burthen of the Country, 27 E. 1. cap. 4. wherefore by the Statute of Weſtminſt. 2 cap. 30. A Writ of Niſi prius, was firſt given; And that, in the Venire facias, as we may ſee in the form of the Writ there mentioned, Scil. Præcipimus tibi quod Venire facias coram Juſticiariis noſtris apud Weſtmon. in octabis, Sancti Michaelis, niſi talis & talis tali die & loco ad partes illas venerint 12. &c. By which Writ it appears, that the Venire facias was not returnable, till after the day of the Niſi prius. But the miſchief thereof was ſo great, partly in reſpect that the parties not knowing the Jurors names, could not tell how to make their Chalenges, and ſo were ſurprized; and partly, in reſpect of the Jury, who were greatly delayed by the Eſſoyns of the parties, that by the Statute of 42 E. 3. cap. 11. It is Ordained, That no Enqueſt, but Aſſizes and deliverances of Goals, be taken

Niſi prius, when firſt given, and wherefore.

Niſi prius in the *Venire facias*.

ken by Writ of Niſi prius, nor in other manner, at the Suit of the great or ſmall, before that the names of all them that ſhall paſſe in the Inqueſts be returned in the Court. And their names muſt be returned upon a Pannel annexed to the Venire facias, ſo that either party may have a Copy of the Jury, that he may know whom to challenge; And the Jury not coming upon the Venire facias make a feigned default, which warrants the Diſtringas, &c. unleſs they appear at the day of the Niſiprius.

The names of the Jurors muſt be returned into the Court before any Tryall, and why.

So that by what hath been ſaid you may perceive to what purpoſe the Sheriff is commanded to cauſe the 12. men to come to Weſtminſter though the Tryal be in the Country. And that, ad faciend quandam Juratam, becauſe it is in the diſcretion of the Court, whether to grant a Writ of Niſi prius, or to have Tryall at the Barr; And for that the Duke of Exeter being Plaintiff in Treſpaſs, a Niſi prius was prayed for the Duke, and it was denyed

It is in the Courts diſcretion, whether to grant a *Niſi prius*, or not.

for that the Duke was of great power in that County. And if the Tryall should be had in the Country, inconvenience might thereupon follow, as you may read, 2 Inst. 424. and 4 Inst. 161. May in some Cases, (as if the Cause require long examination, &c.) it is not in the power of the Court to grant a Nisi prius; if the King please: For in such Cases, as it appears by the Writ in the Register, 186.) the King by his Writ may restrain, and command the Justices, that they shall not award any Writ of Nisi prius; and if they have, that they supersede it. F. N. B. 240. 241. No Nisi prius shall be granted where the King is party, without especiall Warrant from the King, or the Attorney Generalls consent. Stamf. 156. F.N.B. 241. 4 Inst. 161.

When the Cour cannot grant a *Nisi prius*.

Where the King is concerned.

And now since the Nisi prius (for so it is called, because the word prius is before venerint, in the Distringas, &c. which was not so in the venire facias, upon the Statute of

Nisi prius, why so called.

W. 2. cap. 30. before rehearſed,) muſt not be in the venire facias, becauſe the names of the Jurors are to be returned to the Court, before the granting of the Niſi prius; therefore the Niſi prius is now in the Hab. Cor. and Diſtringas. And if the Sheriff return not a Pannel of the Jurors, upon the venire facias, there ſhall be no Niſi prius upon the Tales, untill a Pannel be returned. 27 H. 6. fol. 10. 1 H. 5. fol. 11. which brings me again to ſpeak of the Tales.

No *Niſi prius* before the *Venire facias* is returned.

The *Tales* at Common Law.

A Tales is a ſupply of ſuch men, as were impanalled upon the Return of the venire facias, grantable, when enough of the principall Pannell to make a Jury do not appear, or if a full Jury do appear, yet if ſo many are challenged, that the reſidue will not make a Jury, then a Tales may be granted. And this at Common Law was by Writs of Decem tales, Octo tales, &c. (out of the Kings Courts) one of them after another, as there was need, untill there was a full Jury. But now

now by the Statutes of 35 H.8.6. 4,5. P.M. 7. 5 Eliz. 25. and 14 Eliz.

The Justices of Assize, and Nisi prius, at the Request of Plaintiff, or Demandant, Defendant or Tenant, or of the prosecutor tam quam, (if two, more, or but one of the principall Pannel appeer at the day of Nisi prius,) may presently cause a supply to be made of so many men as are wanting, of them that are there present standing about the Court; And hereupon the very act is called a Tales de circumstantibus. Tales by Statute.

But since none can come after the Reporter, observe with me his Nota Lecteur, in his 10th Report 104. That at Common Law, in the granting of a Tales, five things are to be considered,

1. The time of the granting, &c. thereof.
2. The number of the Tales.
3. The order of them.
4. The manner of Tryall, that is,

is, where, by them with others, and where, by them only.

5. The quality of them is to be considered.

As to the first, 4 things are likewise to be considered,

1. That the time of granting them, is upon default of so many of the principal Pannel, that there cannot be a full Inquest.

2. That at the time of granting them, the principall Array stand; for Tales are words similitudinary, and have reference to the assemblance, which then ought to be in esse: and therefore if the Array be quashed, or all the Polls challenged and treited, no Tales shall be awarded, for then there are not Quales, but in such a Case, a new venire facias shall be awarded. But if at the time of granting the Tales, the principall Pannel stand, and afterwards is quashed as aforesaid, yet the Tales shall stand; For it sufficeth if there were Quales, at the time of granting the Tales.

3. It is to be observed, that he which

which is meerly Defendant, cannot pray a Tales, till the Plaintiff hath made default.

4. In some Cases, a Tales shall be granted after a full Jury appear & is sworn, as if a Jury be charged, and afterwards before a Verdict given in Court, one of them die, a Tales shall be awarded, and no new venire facias, and so if any of the Jurors impannelled die before they appear; and this appears by the Sheriffs return, the Pannell shall not abate, but if there be need, a Tales shall be awarded. And the time for Challenge, and tryall of the Tales, is after the principall Pannel be tryed; and if the principall Pannel be affirmed, the same tryors shall try the Tales; But if it be quashed, then the two tryers of the principall, shall not try the Tales.

As to the second, to wit, the number, two things are to be observed.

1. That in all Cases, the Tales ought to be under the number of the principall in the venire facias, (unless

less in Appeales) as in Attaint, under 24. and in other Actions where the venire facias is of 12. under 12. And the Reason wherefore more than the number may be granted in Appeals of the Plaintiffs part, is, because the Defendant may challenge peremptorily; and if default be in the Plaintiff, then the Defendant may pray a Tales, and the Reason is in favorem vitæ. and that he may expedite and free himself from vexation, and the question of his life, for fear that his Witnesses should die.

2. That the number ought alwayes to be certain, as 10. 8. 6. or 4. &c. But now by the Statute of 35 H. 8. a Tales de Circumstantibus may be granted, as well of an uncertain, as a certain number, and that by force of these words in the Stat. 35 H. 8. So many, &c. as shall make up a full Jury.

As to the third, to wit, the Order, It is to be known, that alwayes

wayes in every new Tales, the number shall be diminished, as if the first be 10. the second shall be 8. and so always lesse. But if the Tales awarded be quashed by Challenge, you may have another of the same number.

As to the fourth, to wit, the manner of Tryal, that is commonly by them with others; but by them only, when after the granting the Tales, the principall Pannel is quashed, then the Tryal shall be only by the Tales; or if the Tales do not amount to a full Enquest, another Tales to supply the former, may be granted.

As to the fifth, to wit, the Quality of the Tales, they ought to be of the same quality as the Quales are; and therefore if the first be per medietatem linguæ, of English and Aliens, so ought the Tales to be, so if the Principal be out of a franchise, so if the Venire facias be directed to the Coroners, so ought the Tales; and all things which are required

Therefore if the *Venire facias* be not *de medietat. linguæ*, the *Tales* cannot. 3 E. 4. 12.

quired by the Law, in the Quales, are required in the Tales: as you may read in the aforesaid Statutes. vide, Stamf. Plees del Corone, fol. 155.

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cause to Tryal again, he may have a Distringas, &c. with a Decem Tales.

Attaint. By the Statute of 23 H. 8. ca. 3. If there be not enough sufficient Freeholders as are required in an Attaint, in the County where such Attaint is taken; a Tales may be awarded into the Shire next adjoyning.

Nisi prius amendable. If the Transcript of the Record of the Nisi prius be mistaken, and not warranted by the Rolls, for which cause the Plaintiff becomes non-suit, he may have a Distringas de novo, upon motion to the Court, and the Postea shall not be recorded, Cro. 1 part. 204. For there is but a

Trans-

Transcript of the Record sent to the Justices of Nisi prius. First they were Justices of Assize, and therefore they retain that name still, though Assizes are very rarely brought: For this common Action of Ejectment hath Effected most reall Actions; and so the Assise is almost out of use.

Justices of *Nisi prius*, and Justices of Assise.

CAP.

CAP. VI.

Of the number of the *Jurors*, and why the Sheriff returns 24. though the *Venire facias* mentions but 12. If he returns more or lesse, no Error, and of the number 12.

NOw for the quales: and these you see for number, must be 12. by the Common Law, D. and St. fo. 14. for quality, liberos & legales homines. And first of their number 12. And this number is no lesse esteemed of by our Law then by Holy Writ; If the 12 Apostles on their 12. Thrones, must try us in our eternall State, good Reason hath our Law to appoint the number of 12. to try our temporall. The Tribes of Israel were 12. the Patriarchs were 12. and Solomons Offi-

Of the number 12.

cers

cers were 12. 1 King. 4. 7. Therefore not only matters of fact were tryed by 12. But of ancient time, 12. Judges were to try matters in Law, in the Exchequer Chamber, and there were 12. Counsellors of State, for matters of State; And he that wageth his Law, must have 11. others with him, which think he sayes true. And the Law is so precise in this number of 12. that if the Tryall be by more or less, it is a Myst-triall; But in Enquests of Office, as a Writ of Waste, there less than 12. may serve. F.N.B. 107. c. and in Writs to inquire of Damages, the just number of 12. is not requisite, for they may be over or under; And although there can be no Verdict, but by 12. yet by ancient course and usage, (which as my Lord Cooke tells you, makes the Law in this Case, 1 Inst. 155.) the Sheriff is to return 24. And this is for expedition of Justice; for if 12. should only be returned, no man should have a full Jury appear or sworn, in respect of Thal-

Plow. Com. in proœmio. 12 Judges.

Less then 12. in Inquests of Office.

Finch 400. 484.

Why the Sheriff returns 24.

lenges, without a Tales, which should be a great delay of Tryals; And for this cause at common Law, 'twas Error if the Sheriff returned less then 24. But now it is remedied by the Statute of 18 Eliz. as a mis-return, see Cro. 1 part. 223. li. 5. 36, 37. By which Books it appears, that if the Sheriff return but 23. &c. it shall not vitiate the Verdict of 12. No, though a full Jury do not appear, so that the Tryal is by ten of the principal Pannel, and two of the Tales, notwithstanding Maynards Opinion to the contrary, and Cro. 3. part. 587.

If the Sheriff return less then 24. it is no Error.

The Sheriffs used to summon above 24. Scil. effrenatam multitudinem, but now they are prohibited by Statute, to summon above 24. Westm. 2. cap. 38.

Must not return above 24.

To make a Jury in a Writ of Right, which is called the Grand Assize, there must be 16. Scil. four Knights, and 12. others; the Jury in an Attaint, called the Grand Jury, must be 24. Finch 412. & 485.

Where there must be 16. and 24. in a Jury.

When

When Proceſs uſed to be made out againſt the Witneſſes in Carta nominat. to joyn with the Jury in Tryal of the Déed, then the number was uncertain, according as the number of Witneſſes were in the Déed: wherefore no attaint lay, if the Déed were affirmed, becauſe more then 12. joyned in the Verdict. But otherwiſe, if the Déed was not found, becauſe Witneſſes cannot prove a Negative. F. N. Br. 106. h. 1 Inſt. 6. 2 Inſt. 130. &c.

Where Witneſs joyn with the Jury, the number is incertain.

Cannot prove a Negative.

If 12. are ſworn, and one of them depart by conſent, another of the Pannel may be ſworn, and joyn with the other 11. in the Verdict. 11 H. 6. 13.

Juror departs; and another ſworn by conſent.

In Error upon a Judgment in Cornwall, becauſe the Tryal was but by 6. adjudged that it was erroneous, though it was returned ſecundum conſuetudinem ibidem ante, &c. for ſuch Cuſtoms are againſt Law, unleſs in Wales, which are permitted by Act of Parliament. Cro. 1. part. 259.

A Jury of 6.

CAP. VII.

Who may be *Jurors*, who not; who exempted; and of their Quality, and Sufficiency.

Jurors must be *Liber.*

SO much for their number, next their Quality is to be considered; And for this, the Writ informs you who they ought to be, 1. Liberos, that is, Freemen, not Villains, or Aliens, and that not only Freemen, and not bond; but also those as have such freedom of minde, that they stand indifferent, without any Obligation of Affinity, Interest, or any other Relation whatsoever, to either party; sometimes the word Probos, instead of Liberos, is attributed to them; they are both good Epethites for a Juror, but I esteem the first most significant.

Forteſcue. cap. 25.

2. They

2. They ought to be Legales, not outlawed, not such as have lost Liberam legem, or become infamous, as Recreants, persons attainted of Felony, false Verdict, Conspiracy, Perjury, Præmunire, or Forgery upon the Stat. of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. Not such as have had Judgment to lose their Ears, stand on the Pillory or Tumbrel, or have been stigmatized or branded, nor Infidels, neither can any such be Witnesses, 1 Inst. 6. Legales.

3. Homines; they ought to be men, (yet there shall be a Jury of Women to try if a Woman be Enseint, upon the Writ de ventre inspiciendo,) But what kinde of men these ought to be, is worthy to be known. And for this, some men are exempted from serving in Juries, in respect of their Dignity, as Barons, and all above them in degree; Many are exempted by the Writ de non ponendis in Assisis. F. N. B. 166. as aged persons 70. years old, A Jury of Women. Exemption of Juries.

Who are to be exempted from Juries.

old, and many others are exempted, as Clerks, Tenants in ancient Demesne, Ministers of the Forrest, (out of the Forrest): Coroners, Infants under the age of 14. years, Officers of the Sheriff, sick decrepid men, and such as are exempted by the Kings Charter: yet in a Grand Assize, preambulation, Attaint, and in some other special Cases, such men as are not exempted by reason of their Dignity, shall be forced to serve, notwithstanding their exemption in other Cases. See Daltons Office of Sheriffs, fo. 121. 52 H. 3. cap. 14. 2 Inst. 127. 130. 378. 447. and 561. Counsellors, Attorneys, Clerks, and other Ministers of the Kings Courts, are not to serve on Juries; But I finde one Jury made of Attorneys of the Common Bench, and Exchequer, In a Case brought upon a Bill in the Exchequer, by Sir Thomas Seton, Justice against Luce C. for calling of him Traytor in the presence of the Treasurer and Barons of the Exchequer. And this Jury of

A Jury of Attorneys.

At-

Attorneys gave the Justice one hundred marks damages. 30 Assize 19.

4. De vicenet. de C. It is not sufficient that they dwell in the County, but they are to be of the Neighbourhood, May, le plus prochenies, to the place of the fact, as by Artic. super, cap. 9. it is appointed: They must be most near, most sufficient, and least suspicious, ib. as I shall shew hereafter. Visne.

5. Quorum quilibet habeat quatuor libras terre, tenement. vel reddit. per annum ad minus; This is their sufficiency, where the debt or damages (or both together, 1 Inst. 272.) amount to 40 Marks or above; The sufficiency of Jurors in other Cases of lesser moment, is still left to the discretion of the Justices, Forteſcue, cap. 25. who, (experience tells us) never require Jurors under 4 li. per annum, according to the Statute of 27 Eliz. cap. 6. before which, men of 40 s. per annum, served; But neither Sufficiency of Jurors.

ther this, nor the Stat. of 35 H. 8. extend to Juries in Cities, Towns Corporate, or other priviledged places, or in the 12. Shires of Wales, so that there they shall be returned, as before they lawfully might have been; for the Jurors sufficiency in Attaints, see the Statutes, 15 H. 6. 5. 18 H. 6. 2. and 13 H. 8. 3.

It is the general course of the World, to esteem men according to their Estate; For Quantum quisque sua nummorum servat in arca, Tantum habet et fidei; And sure I am, the makers of this Law, had cause enough to do so, in this Case; for if men of less Estates should serve in Juries, such Fellows would only be shifted into Enquests, as had more need to be relieved by the 8 d. then discretion to sift out the truth of the fact: 'Tis hard to get an unbyassed Jury now; But surely, less rewards would sooner bribe and byas meaner men, than these. Therefore least poverty or necessity

sity should tempt: Every Juror must have 4 li. per annum, as aforesaid, of Free-hold, out of Ancient Demesne. And the Court may in matters of great consequence, direct a Venire facias, for a Jury of above 4 l. per annum, a piece, but not under Cro. 2. part. 672. But in such Cases (every one knowes) the Court most commonly orders the Prothonotary to chuse 48. out of the Sheriffs Book of Freeholders, of the most substantial men in the County, and the parties strike out 12. a piece, then the Sheriff returns the rest.

Jurors of above 4 l. per annum.

Et qui nec D.E. nec F.G. aliqua affinitate attingunt, the Law is very cautelous, in not leading men into temptation: Therefore least kindred and Affinity, should wrong the Conscience to help a friend, our Ju ors must not be related to any of the parties; And for this Reason likewise, the Statutes provide, that no man of Law shall ride Judge of Assize, or Goal-delivery in his own Country. 8 R. 2. 2. 33 H. 8. cap. 24.

Jurors must not be of affinity to the parties.

But

But because most things concerning the Quality and Sufficiency of Jurors, will come more properly under the Title Challenge, I will refer you thither; And first, observe more particularly, De quo vicinet. the Jury ought to come.

CAP.

CAP. VIII.

Concerning the *Viſne*, from what place the *Jury* ſhall come, &c.

Vicinetum is derived of this word Vicinus, and ſignifieth Neighbour-hood, or a place near at hand, or a Neighbour place, where the queſtion about the fact is moved. And the moſt generall Rule (ſaith Coke, 1 Inſt. 125.) is, That every Tryal ſhall be, out of that Town, Pariſh, or Hamlet, or place known out of the Town, &c. within the Record, within which the matter of fact iſſuable is alledged, which is moſt certain and neareſt thereunto, the Inhabitants whereof, may have the better, and more certain knowledge of the fact. Viſne.

And

And if the fact be alledged in quadam platea vocat. Kingſtreet in parochia ſanctæ Margaretæ in Com. Midd.

Pariſh. In this Caſe the Viſne cannot come out of Platea, becauſe it is neither Town, Pariſh, Hamlet, nor place out of the Neighbour-hood, whereof a Jury may come by Law; but in this Caſe, it ſhall not come out of Weſtminſt. but out of the Pariſh of St. Margaret, becauſe that is the moſt certain. But therein alſo it is to be noted, that if it had been alledged in Kingſtreet, in the Pariſh of St. Margaret, in the County of Middleſex, then ſhould it have come out of Kingſtreet; for then ſhould Kingſtreet have been eſteemed in Law a Town: For whenſoever a place is alledged generally, in pleading (without ſome addition to declare the contrary, (as in this Caſe it is) it ſhall be taken for a Town.

Town.

[Parochia.] And albeit parochia generally alledged, is a place incertain, and and may (as we ſee by experience) include

include divers Towns; yet if a matter be alledged in parochia, it shall be intended in Law, that it containeth no more Towns than one, unless the party do shew the contrary. But when a Parish is alledged within a City, there without question the Visne shall come out of the Parish, for that is more certain than the City. Mar. 559.

If a Trespass be alledged in D. and nul tiel ville is pleaded, the Jury shall come de Corpore Comitatus. But if it be alledged in S. & D. and nul tiel ville de D. is pleaded, The Jury shall come out de vicineto de S. for that is the more certain; so if a matter be alledged within a Manner, the Jury shall come de vicineto Manerii. But if the Manor be alledged within a Town, it shall come out of the Town, because that is most certain, for the Manor may extend into divers Towns. And all these points were resolved by all the Judges of England, upon Conference between them, in the Case of De Corpore Comitatus. Manner.

John

John Arundell Esq; indicted for the death of William Parker.

De Corpore Com.

Where there may be a speciall Visne, the Tryal shall never be de Corpore Comitatus. Leon. 1 part. 109.

Heir tryed where the Land lies, where not.

In a reall Action where the Demandant demands Land in one County, as Heir to his Father, and alledges his Birth in another County, if it be denyed that he is Heir, it shall not be tryed where the Birth is alledged, but where the Land lyeth; For there the Law presumes it shall be best known who is Heir. But if the Defendant make himself Heir to a Woman (for that is the surer, and more certain side, and the Mother is certain when perhaps the Father is uncertain) and therefore there it shall be tryed where the Birth is alledged because they have more certain Cognusance, then where the Land lyeth.

Cro. 3. part. 818. Cro. 2. part. 303.

Bastardy.

And so it is where Bastardy is alledged, the Tryal shall be

like Caſe, Mutatis Mutandis.

Non conceſſit where the Land lies.

If the man plead the Kings Letters Patents, and the other party plead non conceſſit, it ſhall not be tryed where the Letters bear date, for they cannot be denyed, but where the Land lyeth.

Viſne.

Every Tryal muſt come out of the Neighbour-hood of a Caſtle, Mannor, Town, or Hamlet, or place known out of a Caſtle, Mannor, Town or Hamlet, as ſome Forreſts, and the like, as before.

Where the Writ is brought at Common-Law.

Every Plea concerning the perſon, Plaintiff, &c. ſhall be tryed where the Writ is brought.

When the matter alledged extendeth into a place at the Common Law, and a place within a Franchiſe, it ſhall be tryed at the Common-Law.

Matters done beyond Sea, may be tryed in England, and therefore a Bond made beyond Sea,

Matters done beyond Sea, how tryable in *England*.

Sea, may be alleadged to be made in any place in England, if it bear date in no place; But if there be a place, as at Burdeaux in France, then it shall be alleadged to be made in quodam loco vocat. Burdeaux in France, in Islington, in the County of Middlesex, and from thence shall come the Jury, 1 Inst. 261. Lach 4. and 5. So if the Tenant plead, that the Demandant is an Alien born,

Alien.

under the Obedience of the French King, and out of the Legiance of the King of England; the Demandant may reply, that he was born at such a place in England, within the Kings Legiance, and hereupon a Jury of 12. men shall be charged; and if they have sufficient Evidence that he was born in France, or in any other place out of the Realm, then shall they finde, that he was born out of the Kings Allegiance. And if they have sufficient Evidence that he was born in England, or Ireland, or Jernsey, or Jersey, or elsewhere within the Kings Obedience, they shall finde that he was

born

born within the Kings Legiance: And this hath ever been the pleading, and manner of Tryal, in that Case. So of other things done beyond Sea, the adverse party may alledge them to be done at such a place in England, from whence the Jury shall come, and in a Speciall Verdict, they may finde the things done beyond Sea. Ib. lib. 7.26.

Things done beyond Sea.

Lib. 7. 26.

So when part of the act is done in England, and part out of the Realm, that part that is to be performed out of the Realm, if Issue be taken thereupon, shall be tryed here by 12. men, and they shall come out of the place where the Writ or Action is brought. Ib. lib. 6. 48.

Part without the Realm, and part within.

Error, for that Judgment was given by default against the Defendant, being an Infant, Issue was taken that he was of full age. And Godfrey moved, whether the Tryal should be in Norfolk, where the Land was, or in Middlesex, where

Full age tryed where the Land lies.

the Action was brought. And the Court held, that it should be tryed in the County where the Land lay; and Tanfield said, It was so adjudged in the Kings Bench, between Throgmorton and Burfind. Cro. 3. part. 818.

This is called a Joynder of Counties. Finch. 410.

If the Venue arise in two Counties, the Jury upon 2. Venire facias, shall come from both, 6. out of one County, and 6. from the other. Cro 3. part. 646. but by consent of parties, entred upon Record, it may be by 5. out of one, and 7. from the other, as appears, Cro. 3. part. 471. where in Replevin, the Defendant avows for damage feasant; The Plaintiff by his Replication, claims common by prescription in loco quo, &c. being Broadway in the County of Worcester, appurtenant to his Mannor of D. in the County of Glocester, and Issue thereupon, and 2. Venire facias awarded to the Sheriffs of the several Counties, and now 7. of the County of Worcester appeared, and 5. of Glocester.

Jury out of two Counties.

And

And although there ought to have been 6. sworn of each County, to try that Issue, as appears 49 Ed. 3. 1. 31 H. 8. 46. yet by the assent of the parties, those 12. who appeared, by advice of all the Justices, were sworn, and tryed the Issue. And it was commanded, that this Assent should be entred upon Record; for otherwise it would be a strange President.

In an Action of Trover, apud Paxton in Com. Hunt. the Defendant pleads a Bargain and Sale, apud Royston in Com. Hertford, in the Market there, whereby he after converted them, apud P. in Com. Hunt, The Plaintiff saith, that he was possessed of those Goods, apud. P. in Com. Hunt. and that J. S. there stole them from him, and by Covenant betwixt him and the Defendant, at P. in Com. H. he sold them to the Defendant, as he hath pleaded: The Issue was upon the sale made by Covenant. &c. And it was tryed in the County of Hunt. and found

Covenant in P. to sell at R. tryed at P.

found for the Plaintiff. And it was moved to be a mis-tryal; for it ought to have been by a Jury of the County of Hertford, or at leastwise by a Jury of both Counties; But it was adjudged to be well tryed, because the sale is confessed, and the Issue is upon the Covenant alledged in Hertford, Cro. 3. part. 511.

Usurous Contract in another County.

In Debt upon a Bond in London, the Defendant pleaded an usurious Contract in the County of Warwick; the Plaintiff replyed, that the Bond was made upon good consideration, Absque hoc, that it was made for such usurious Contract: the Tryal shall be in the County of Warwick; for the Bond is confessed, and the usury in Warwick is only in question; so if the Issue be, whether the Deed were made by Dures, the Tryal shall be where the Dures, and not where the Deed, is supposed to be made. Cro. 3. part. 195.

A *Dures* shall be tryed there, not where the Action is brought.

Where

Where Iſſue is taken upon a ſurrender, it ſhall be tryed where it was alleadged to be done, and not where the Mannor is, of which the Copy-hold is holden, lb. fo. 260. Br. tit. Viſne. 114. Surrender.

In an Aſſumpſit laid at London in Warda de Cheape, the Venire was De parochia de Arcubus in Warda de Cheape, whereas no Pariſh was mentioned before in the Count, and adjudged that the Venire was ill laid in the Count, for a Venire facias may be of a Town, Pariſh, Mannor, or other place known, but not of a Hundred or Ward, ib. and ſo it is adjudged, ib. Cro. 1. part. 165. for the Ward in a City, is but as the Hundred in a County. Ward or Hundred, no good *Viſne.*

Where the Viſne is laid to be at a City, in an Action brought in a ſuperior Court, or within the City, though it be both a City and County, the Venire facias may be de vicinet. Civitatis, Lach. 258. Though it hath been held not good, but that the Venire facias muſt be, de Civitate, City.

leaving out Vicinet. as you may read in Stamf. 155. But now the Caſe in Cro. 2. part. 308. and Bulſtr. 1. part. 129. ſay, that all Venire fac: are awarded de vicinet. Civitatis, which is intended as well de Civitate it ſelf, as de vicinet. infra Juriſdictionem of the City. And ſo it is, de vicinet. Civitatis, or de vicinet. or de Civitate Coventry, Eborum, Norwich, Sarum, Briſtow, Exon, and all other Cities which are Counties in themſelves; In all places beſides London, no mention is made of the Pariſh or Ward; Ib. 493. But in London, the Pariſh and Ward is mentioned. And therefore it was adjudged, Cro. 2. part. 150. That it was not good to alleadge any thing done in London generally; But it muſt be, in what Pariſh, from which a Venire may be; But where a thing is laid in a City, in alta Warda there, and the Venire facias is from the City only, it is well, becauſe it ſhall be intended there be no more Wards in the ſame City. Cro. 3. part. 282.

Stiles 2. March 125.

London.

City.

A Venire facias was awarded from T. and not de vicinet. de T. and for this cause resolved to be ill, and not amendable. Cro. 2. part. 399. Bro. tit. Ven. fa. 8. De vicinet. left out, ill.

If the Issue be Si rex Concessit per literas patentes, The Tryall shall be, as hath been said, where the Land lies, and not where the Patent was made, because the Patent is of Record; and if it be traversed, it shall be tryed by the Record, and therefore the Issue being upon non concessit, the Issue is not upon the Patent; but where the Issue is upon non Concessit, or non dimisit, of a thing which passeth by Deed, the Tryal shall be where the Grant or Demise is alleadged. But of a Feoffment, or Lease for life pleaded, the Issue being non Feoffavit, or non dimisit, Livery ought to be made, and therefore the Tryal shall be where the Land lies. Cro. 2. part. 376. 3. part. 259. Where the Land lies.

Where the Action is laid in one County, and the Justification in another, the Tryal shall be where the Justification is.

Where the offence is laid in the Count to be in one County, and the Justification in another County, and the Plaintiff replies, de injuria sua propria, &c. The Visne shall be where the Justification is alledged; As, one Example for all, to illustrate. In an Action upon the Case, for words supposed to be spoken at Bridg-North, in the County of Salop, the Defendant pleads, that he spake them as a Witness upon his Oath, upon an Issue tryed at Chard, in the County of Somerset. The Plaintiff replies de son tort demesne, &c. And thereupon it was tryed by a Venire facias of Bridg-north, And Error thereof assigned, because it ought to have been by a Visne of Chard, where the Justification arose, and it was held clearly to be a mis-tryall; and not ayded by the Stat. of Jeofailes; wherefore the Judgment was reversed. Cro. 3. part. 468. 261. 870. More 410.

In an Action of the Case against a Sheriff, upon an escape in London, and

and the Arreſt laid to be in Southampton; adjudged, that the Viſne ſhall be where the eſcape was, becauſe that is the ground of the Action, and not where the Arreſt was. Cro. 3. part. 271.

Where the eſcape was, and not where the Arreſt was.

In Debt upon an Obligation, payment was pleaded, apud domum manſionalem Rectoriæ de Much-Hadam, and the Venire facias was de vicineto de Much-Hadham, where it ought to have been de vicinet. Rectoriæ de Much-Hadam; but it was adjudged good, becauſe Much-Hadam is here intended a Vill. Ib. 804. So you ſee, that where a thing is alledged to be done at the Capitall Houſe* of D. there the Venire ſhall be of D. For that is intended to be all one with the Vill: but where it is at the Caſtle of Hartford, &c. There the Venire facias ſhall not be de vicineto de Hartford; but de Caſtro de Hartford, for Caſtrum Hartford. is intended a diſtinct place by it ſelf, and ſo of all Caſtles. Cro. 2. part. 139. More 862.

* Rectoriæ.

Caſtell.

Where

Mannor.

Where the Issue is not parcel of the Mannor of D. or the Custom of a Mannor is in question, the Venire ought to be of the Mannor. Hob. 284. Cro. 2. part. 327. If the Mannor be laid to be in a Vill. the Venire facias may be of the Mannor in the Vill. as de vicineto manerii de Scansted Hall in Windham. Cro. 2. part. 405. More 851. Arundels Case. li. 6. 14.

London.

In the Common Bench, in Trespas, for taking away a Bag of Pepper, the Defendant justified as Servant of the Maior and Commonalty of London, for Wharfage due to them, by the Custom of London, which the Plaintiff refused to pay. The Plaintiff replyed, that the Custom did not extend to him, because he was a Free-man of the City, and ought not to pay Wharfage, to which the Defendant re-joyned, that the Custom extended to him, as well as to strangers; upon which, Issue was joyned.

Resolved

Resolved, 1. That the Issue should be tryed per Pais, not by the mouth of the Recorder, because he certifies nothing but what the Maior and Aldermen direct, who are concerned in the cause. Recorder.

2. That the Venire facias should not be awarded to the Sheriffs of London, nor Middlesex, because the Tryals there, are by Freemen. But it shall be to the County next adjoyning, viz. to the Sheriff of Surry. So where any City is concerned, the venire facias shall not be directed to the Officers of the City, but to the County next adjoyning. Hob. 85. Stiles 137. More 871. Where the tryal shall be by the County next adjoyning.

Where a Man lends a Horse to another to till his Land, and the Horse dies with excessive Labour, the Visne shall be from the place where the excessive labour was, and not where the delivery was. More 887. vide Hob. 188. Where a man lends his horse in one place, and he is spoiled in another, *Visne* where he is spoiled.

Where

Promiſe in one place, and breach in another.

Where a promiſe is laid in one place, and the breach in another, the Viſne muſt be according to the event of the Iſſue, whether it be taken upon the promiſe, or breach. But if no place be alledged for the breach, & Iſſue be taken upon it, the Viſne muſt be from the place of the promiſe, which ſhall be intended right, where the contrary appears not, ſee Godbolt 274.

Viſne guided by the Iſſue.

Eaſter 39 Eliz. In the Kings Bench, Treſpaſs, Aſſault and Battery, en Wilts, continuing the Aſſault in Middleſex, and adjudged that the Jurors ſhall come out of both Counties. More 538.

Miſnomer.

The name of a Mannor, or Land, or other locall thing, ſhall be tryed where it lies, becauſe it is locall; but the name or addition of a perſon, ſhall be tryed where the Action is brought, becauſe this is tranſitory. Bro. tit. Viſne 7. lib. 6. 65.

In Covenant upon an Indenture of Demiſe of the Rectory of Stoken Church

Church, in the County of Oxford, That the Defendant had good Power and Authority to demiſe: The Indenture was alledged to be made at London, and the Venire facias was awarded to the Sheriff of Oxon, and this being aſſigned for Error, Judgment was affirmed, and this adjudged to be good. More 710. becauſe the Rectory was in Com. Oxon. Vide, pag. 45. Where the Land lies.

Where the Pariſh is named by way of denotation, or explanation of the place, where the Fact is alledged to be done, as at the Pariſh-Church of Hauk-hucknol, there the Venire facias ſhall be of the Town, not of the Pariſh. Bulſtr. 1 part. fo. 61. Pariſh.

If the Fact be alledged in King-ſtreet, in the Pariſh of St. Margarets, in Com. Mid. You have already heard that the Viſne ſhall be from Kingſtreet, becauſe it is intended to be a Town; but where it is alledged to be done at the Grays-Inn Hall Town.

Hall, or Lincolns-Inn-Hall, &c. or Holborn, the Vicne shall be from Holborn, which is the Town; for as Yelverton said, it was never heard of any Venire facias to be had of any of the Inns of Court, Bulstr. 2. part. 120. especially of the Hall, because it cannot be of a House, much less of a Hall.

Inns of Court.

Not from house or hall.

In Ejectment upon a Demise made at Denham of Lands in parochia de Denham predict. The Vicne may be of Denham, or of the Parish of Denham, because Denham & Parochia de Denham predict. are all one by intendment of Law. Bulstr. 2. part. 209. More 709. Hob. 6. But when it appears by the Record, or is intended that the Parish is more spacious than the Town, as the Case in More 837. where in Ejectment the Lease was alledged to be made at Bredon, of Tythes in W. and W. Hamlets within the Parish of Bredon, there the Venire facias must not be of Bredon, but of the Parish, because it appeares, that the Parish

Parish.

extends further than the Town. Hob. 326.

Where an Action of Debt for Rent, is brought upon the privity of the Contract, by the Lessor, as against the Lessee, or his Executors, for Arrearages due in the life-time of the Testator, the Visne may be laid in any place; but where the Action is brought upon the privity in Estate, as against the Assignee of the Lessee, or his Executors, for Rent due after the Testators death, the Visne must be, where the Lands lie. Lach misprinted, 197. li. 3. 24.

For Rent where the Land lies, and when not.

Walkers Case, in Debt upon a Lease of Land in another County, Nihil debet, shall be tryed where the Action is brought. Br. tit. Visne 119. Vide, pag. 93.

Debt for rent of Land in another County.

In Replevin brought by Strede, against Hartly, for taking a Distress at Baildon, the Defendant made Conusance as Bayliff, because that locus in quo, &c. was holden of W. H. as of his Mannor of Baildon, and

and upon Iſſue, hors de ſon fee, the Venire facias, was de vicineto de Baildon; and upon motion that the Venire facias ought to have been, as well from the Mannor, as the Town. The Court adjudged it to be well enough, for that the Court ſhall not intend the Mannor was larger than the Town, becauſe it doth not appear ſo to be, though poſſibly it might, as like the Caſe of Town and Pariſh. Hob. 305. 326.

Mannor.

If the Sheriff return that there are no Freeholders of that Viſne, or if the Viſne be where the Kings Writ runs not, as in the Cinque Ports, &c. or in a place where the men are priviledged, from ſerving on Juries out of that place. as the Iſle of Ely, &c. the Plaintiff may pray a Venire facias of the Viſne next adjoyning, and if the Viſne be in Wales, (ou bien ſe le Royne Court) the Venire facias ſhall be directed to the Sheriff of the next Engliſh County, to cauſe the Jury to come De propinquiori Viſne of his County, to the

Viſne next adjoyning in what Caſes.

Wales.

the Viſne in Wales adioyning. Fitz. Abridg. tit. Viſne 8. Juriſdict. 24.

If the Viſne is in ſome part miſawarded, or ſued out of more places, or fewer places than it ought to be, ſo as ſome place be right named, this is ayded by the Statute of Jeofailes, which hath ended the differences, in many Cales reported in our Books, concerning this point, wherefore I purpoſely omit them. Viſne miſawarded in part.

Error, for that the Judgment was given by default againſt the Defendant, being an Infant, upon Iſſue that he was of full age, adjudged, that the Tryal ſhould be in Norfolk, where the Land was, and not in Middleſex, where the Action was brought. Cro. 3. part. 818. Infamy, where the Land lies.

If the Viſne cometh from a wrong place, yet if it be per aſſenſum partium, and ſo entred of Record, it ſhall ſtand for Omnis Conſenſus tollit errorem. 1 Inſt. 125. May be out of a wrong place by Conſent.

CAP. IX.

Challenges.

YOu have already ſeen of what Viſne the Jury ought to be: The next thing to be conſidered, is concerning Challenges. And for this, I ſhall preſent you with my Lord Cooks Collection. 1 Inſt. 156. The rather becauſe he hath taken more pains in the gathering and methodizing this Learning, then any other one point whatſoever; And I know no Reaſon, wherefore I may not as well uſe his method, for the perfection of this Treatiſe, as he hath uſed other mens method and matter, (eſpecially Perkins, whom he ſeldom cites) for the perfection of his: Judgment hath the preheminence of Invention, and the Law hates nothing more then Innovation; wherefore I ſhall follow his method

method in the description of a Challenge, omitting the Book Cases, and Authorities cited by him.

Challenge is a word common as well to the English as to the French, and sometimes signifieth to claim, and the Latine word is vendicare; sometime in respect of revenge to challenge into the field, and then it is called in Latine, vindicare or provocare; Sometime in respect of partiality or insufficiency, to challenge in Court persons returned on a Jury. And seeing there is no proper Latin word to signifie this particular kind of Challenge, they have framed a word anciently written Chalumniare, and Columpniare, and Calumpniare, and now written Calumniare, and hath no affinity with the verbe Calumnior, or Calumnia, which is derived of that, for that is of a quite other sense, signifying a false accuser, and in that sense, Bracton useth Calumniator to be a false accuser: but it is derived of the old word Caloir, or Chaloir, Challenge. Calumniator.

which in one ſignification is to care for, or foreſee. And for that to challenge Jurors, is the mean to care for or foreſee, that an indifferent tryal be had, it is called Calumniare, to challenge, that is, to except againſt them that are returned to be Jurors, and this is his proper ſignification: But ſometimes a Sommons, Sommonitio is ſaid to be Calumniata, and a Count to be challenged, but this is improperly. And forasmuch as mens lives, Fames, Lands, and Goods, are to be tryed by Jurors, it is moſt neceſſary that they be Omni exceptione majores, and therefore I will handle this matter the more largely.

Challenge is twofold.

A Challenge to Jurors is twofold, either to the Array, or to the Polls: to the array of the principall Pannell, and to the array of the Tales. And herein you ſhall underſtand, that the Jurors names are ranked in the Pannel one under another, which order or ranking the Jury is called the Array, and the Verbe, to array the Jury, and ſo we

To the Array.

ſay

ſay in common ſpæch, Battail array, for the order of the battail. And this array we call Arraiamentum, and to make the array, Arrairare, derived of the French word Arroier; ſo as to challenge the array of the Pannel, is at once to challenge or except againſt all the perſons ſo arrayed or impannelled, in reſpect of the partiality or default of the Sheriff, Coroner, or other Officer that made the Return. Array.

And it is to be known, that there is a principal cauſe of challenge to the Array, and a challenge to the favour: principall, in reſpect of partiality, as firſt, if the Sheriff or other Officers be of kindred or affinity to the Plaintiff or Defendant, if the affinity continue. Secondly, If any one or more of the Jury be returned at the denomination of the party, Plaintiff or Defendant, the whole array ſhall be quaſhed. So it is if the Sheriff return any one, that he be more favourable to the one than to the other, Principall Challenges.

all the array shall be quashed. Thirdly, if the Plaintiff or Defendant have an Action of Battery against the Sheriff, or the Sheriff against either party, this is a good cause of challenge. So if the Plaintiff or Defendant have an action of debt against the Sheriff, (but otherwise it is, if the Sheriff have an action of debt against either party) or if the Sheriff have parcel of the Land depending upon the same Title, or if the Sheriff or his Bayliff which returned the Jury, be under the distress of either party; or if the Sheriff or his Bayliff be either of Counsel, Atturney, Officer in fee, or of Robes, or servant of either party, Gossip, or Arbitrator in the same matter, and treated thereof. And where a subject may challenge the array for unindifferency, there the King, being a party, may also challenge for the same cause, as for Kindred, or that he hath part of the Land, or the like; and where the array shall be challenged against the King, you shall read in our Bwks.

By

By default of the Sheriff, as when the array of a Pannel is returned by a Bayliff of a Franchise, and the Sheriff return it as of himself, this shall be quashed, because the party shall lose his challenges. But if a Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his remedy against him.

If a Peer of the Realm, or Lord of Parliament be demandant or Plaintiff, Tenant or Defendant, there must a Knight be returned of his Jury, be he Lord Spiritual, or Temporal, or else the array may be quashed: but if he be returned, although he appear not, yet the Jury may be taken of the residue. And if others be joyned with the Lord of Parliament, yet if there be no Knight returned, the array shall be quashed against all. So in an attaint, there ought to be a Knight returned to the Jury.

Where there must be a Knight returned of the Jury.

And when the King is party, as in travers of an Office, he that traverseth

Where the King is party.

verseth may challenge the array, as hereafter in this Section shall appear; And so it is in case of life: And likewise the King may challenge the array, and this shall be tryed by Tryors according to the usuall course. The array challenged on both sides shall be quashed.

And if two estrangers make a Pannel, and not in favourable manner for the one party, or the other, and the Sheriff returns the same, the array was challenged for this cause, and adjudged good.

If the Bayliff of a Liberty return any out of his Franchise, the array shall be quashed, as an array returned by one that hath no Franchise shall be quashed.

Challenge to the favour.

Challenge to the array for favour: He that taketh this, must shew in certain the name of him that made it, and in whose time, and all in certainty: This kinde of Challenge being no principal challenge,

lenge, muſt be left to the diſcretion and conſcience of the Triors; as if the Plaintiff or Defendant be Tenant to the Sheriff, this is no principall Challenge, for the Lord is in no danger of his Tenant, but è converſo it is a principal Challenge; but in the other he may challenge for favour, and leave it to tryall. So affinity betwæn the Sonne of the Sheriff, and the Daughter of the party, or è converſo, or the like, is no principal challenge, but to the favour; but if the Sheriff marry the Daughter of either party, or e converſo, this (as hath bæn ſaid) is a principall Challenge, or the like. But where the King is party, one ſhall not challenge the array for favour, &c. becauſe in reſpect of his allegeance, he ought to favour the King more. But if the Sheriff be a Vadelet of the Crown, or other meniall ſervant of the King, there the challenge is good, and likewiſe the King may challenge the array for favour. For the King.

Note,

To the Array. Note, upon that which hath been said it appeareth, that the challenge to the array, is in respect of the cause of unindifferency, or default of the Sheriff or other Officer that made the Return, and not in respect of the persons returned, where there is no unindifference or default in the Sheriff, &c. for if the challenge to the Array be found against the party that takes it, yet he shall have his particular challenge to the Polls.

To the Polls. In some Cases a Challenge may be had to the Polls, and in some Cases not at all. Challenge to the Polls, is a challenge to the particular persons, and these be of four kinds, that is to say, Peremptory, Principall, which indure favour, and for default of Hundredors.

Peremptory Challenge. Peremptory, this is so called, because he may challenge peremptorily upon his own dislike, without shewing of any cause, and this only is in case of Treason or Felony, in fa-

favorem vitæ; and by the common Law, the prisoner upon an Endictment or Appeal, might challenge thirty five, which was under the number of three Juries; but now the Statute of 22 H. 8. the number is reduced to 20. in petite Treason, Murder and Felony; and in Case of high Treason, and Misprision of high Treason, it was taken away by the Stat. of 33 H. 8. but now by the Stat. of 1 & 2 Phil. & Mary, the Common Law is revived for any Treason, the prisoner shall have his Challenge to the number of 35. and so it hath been resolved by the Justices, upon conference betwéen them in the Case of Sir Walter Raleigh and George Brooks: But all this is to be understood when any subject that is not a Péer of the Realm, is arraigned for Treason or Felony. But if he be a Lord of Parliament, and a Péer of the Realm, and is to be tryed by his Péers, he shall not challenge any of his Péers at all, for they are not sworn as other Jurors be, but find the

No Challenge of Peers.

the party guilty or not guilty, upon their Faith or Allegeance to the King, and they are Judges of the fact, and every of them doth separately give his Judgment, beginning at the lowest. But a subject under the degree of Nobility, may in case of Treason or Felony, challenge for just cause as many as he can, as shall be said hereafter. In an appeal of death, against divers, they plead not guilty, and one joynt Venire facias is awarded, if one challenge peremptorily, he shall be drawn against all. Otherwise it is of several Venire fac.

Note, that at the common Law, before the Stat. of 33 E. 1. the King might have challenged peremptorily without shewing cause, but only that they were not good for the King, and without being limited to any number, but this was mischievous to the subject, tending to infinite delayes and danger. And therefore it is Enacted. Quod de cætero licet pro Domino Rege dicatur quod ju-

juratores, &c. non ſunt boni pro Rege: non propter hoc remaneant inquiſitiones, &c. ſed aſſignent certam cauſam calumniæ ſuæ, &c. whereby the King is now reſtrained.

Principal, ſo called, becauſe if it be found true, it ſtandeth ſufficient of it ſelf, without leaving any thing to the Conſcience or diſcretion of the Triors. Of a principal cauſe of challenge to the Array, we have ſaid ſomewhat already; now it followeth with like brevity, to ſpeak of principal Challenges to the Polls, (that is) ſeverally to the perſons returned. Principall Challenge to the Polls.

Principal Challenges to the Poll may be reduced to four heads. Firſt, Propter honoris reſpectum, for reſpect of Honour: Secondly, Propter Defectum, for want or default: Thirdly, Propter Affectum, for affection or partiality; Fourthly, Propter Delictum, for Crime or Delict. To the Polls.

First,

Principall Challenges to the Polls.

First, Propter Honoris respectum, As any Pèer of the Realm, or Lord of Parliament, as a Baron, Viscount, Earl, Marquels, and Duke, for these in respect of Honour and Nobility, are not to be sworn on Juries; and if neither party will challenge him, he may challenge himself; for by Magna Charta it is provided, Quod nec super eum ibimus, nec super eum mittemus nisi per legale judicium parium suorum, aut per legem terræ. Now the Common Law hath divided all the subjects into Lords of Parliament, and into the Commons of the Realm. The Pèers of the Realm are divided into Barons, Viscounts, Earls, Marquesses and Dukes; The Commons are divided into Knights, Esquires, Gentlemen, Citizens, Yeomen, and Burgesses: And in Judgement of Law, any of the said degrées of Nobility are Pèers to another: As if an Earl, Marquels, or Duke, be to be tryed for Treason or Felony, a Baron, or any other degrée of Nobility is his Pèer.

Propter honoris respectum.

A Peer may challenge himself.

Peers and Commons.

In

In like manner, a Knight, Esq; &c. shall be tryed per Pares, and that is by any of the Commons, as Gentlemen, Citizens, Yeomen, or Burgesses; so as when any of the Commonsis to have a Tryal, either at the Kings Suit, or betwéen party and party, a Péer of the Realm shall not be impannelled in any Case.

Secondly, Propter Defectum.

Challenge *Propter defectum.*

1. Patriæ, as Aliens born.

2. Libertatis, as Villains or Bondmen, and so a Champion must be a Fréeman.

3. Annui sensus. i. liberi tenementi. First, what yearly Fréehold a Inror ought to have, that passeth upon Tryal of the life of a man. or in a Plea reall, or in a Plea personal, where the debt or damage in the Declaration amounteth to 40. Marks, Vide, Littleton, Sect. 464. Secondly, this Fréehold must be in his own right, in Fée-simple, Fée tail, for terme of his own life, or for another mans life, although it be upon condition, or in the right of his Wife, out

See before, *Quorum quilibet habeat,* 4 l. &c.

out of antient Demesne; for Freehold within ancient Demesne will not serve, but the debt or damage amounteth not to 40. Marks, any Freehold sufficeth. Thirdly, he must have Freehold in that County where the cause of the Action ariseth, and though he hath in another, it sufficeth not. Fourthly, if after his return he selleth away his land, or if Cesty que vie, or his Wife dyeth, or an entry be made for the condition broken, so as his Freehold be determined, he may be challenged for insufficiency of Freehold.

Challenges *propter defectum hundredorum.*

4. Hundredorum: First, by the common Law in a Plea reall, mixt, and personal, there ought to be four of the Hundred (where the cause of Action ariseth) returned for their better notice of the cause; for Vicini vicinorum facta præsumuntur scire. And now since Littleton wrote, in a Plea personal, if two Hundredors appear, it sufficeth; and in an Attaint, although the Jury is double, yet the Hundredors are not double.

double. Secondly, If he hath either Freehold in the Hundred, though it be to the value but of half an Acre, or if he dwell there, though he hath no Freehold in it, it sufficeth. Thirdly, if the cause of the Action riseth in divers Hundreds, yet the number shall suffice, as if it had come out of one, and not severall Hundredors out of each Hundred. Furthly, if there be divers hundreds within one Leet or Rape, if he hath any Freehold, or dwell in any of those Hundreds, though not in the proper hundred, it sufficeth. Fifthly, if the Jury come de corpore Comitatus, or de proximo hundredo, where the one party is Lord of the Hundred, or the like, there need be no Hundredors be returned at all. Sixthly, if a Hundredor after he be returned, sell away his Land within that Hundred, yet shall he not be challenged for the Hundred, for that this notice remains; otherwise as hath been said for his insufficiency of Freehold, for his fear to offend, and

Hundredors.

No Hundredors.

to have Lands wasted, &c. which is one of the Reasons of Law, is taken away. Seventhly, he that challengeth for the Hundred, must shew in what Hundred it is, and not drive the other party to shew it. Eightly, his Challenge for the Hundred is not simpliciter, but secundum quid; for though it be found that he hath nothing in the Hundred, yet shall not he be drawn, but remain præter H. that is, besides for the Hundred, and albeit he dwelleth, or have Land in the Hundred, yet must he have sufficient Freehold.

Challenges *propter affectum.*

3. Propter affectum: And this is of two sorts, either working a principall Challenge, or to the favour. And again a principal Challenge is of twa sorts, either by Judgement of Law, without any Act of his, or by Judgment of Law upon his own Act.

Principall Challenge.

And it is said that a principal Challenge is, when there is express favour, or express malice. First, without any Act of his, as if the

Juror

Juror be of blood or kindred to either party, Consanguineus, which is compounded ex Con & sanguine, quasi eodem sanguine natus, as it were issued from the same blood; and this is a principal challenge, for that the Law presumeth that one Kinsman doth favour another, before a stranger, and how far remote so ever he is of kindred, yet the Challenge is good. And if the Plaintiff challenge a Juror for kindred to the Defendant, it is no Counterplea, to say that he is of kindred also to the Plaintiff, though he be in a nearer degree. For the words of the Venire facias, forbiddeth the Juror to be of kindred to either party. Kindred.

If a body politick or incorporate, sole or aggregate of many, bring any Action that concerns their body politick or incorporate, if the Juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred, yet) for that those bodies consist of natural persons, it is a principal Bodies Politick.

lenge. A Baſtard cannot be of kindred to any, and therefore it can be no principal challenge. And here it is to be known, that Affinitas, Affinity hath in Law two ſenſes. In his proper ſenſe it is taken for that nærneſs that is gotten by mariage, Cum duæ cognationes inter ſe diviſæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur Affinis. In a larger ſenſe Affinitas is taken alſo for Conſanguinity and Kindred, as in the Writ of Venire facias, and other where. Affinity, or Alliance by Mariage, is a principal Challenge, and equivalent for Conſanguinity, when it is betwéen either of the parties, as if the Plaintiff or Defendant marry the Daughter, or Couſin of the Juror, or the Juror marry the Daughter or Couſin of the Plaintiff or Defendant, and the ſame continues, or Iſſue be had. But if the Son of the Juror hath maried the daughter of the Plaintiff, this is no principal Challenge, but to the favour, becauſe it is not betwéen the parties. Much more may

Affinity.

be

be ſaid hereof, ſed ſumma ſequor faſtigia rerum.

If there be a Challeuge for Coſinage, he that taketh the Challenge muſt ſhew how the Juror is Couſin. But yet if the Coſinage, that is, the effect and ſubſtance be found, it ſufficeth; for the Law preferreth that which is material, before that which is formall. Coſinage.

If the Juror have part of the Land that dependeth upon the ſame Title. Depending on the ſame Title.

If a Juror be within the Hundred, Leet, or any way within the Seigniory, immediately, or mediately, or any other diſtreſs of either party, this is a principal Challenge. But if either party be within the diſtreſs of the Juror, this no principal Challenge, but to the favour. Diſtreſs.

If a Witnes named in the Deed be returned of the Jury, it is a good cauſe of Challenge of him. So it is if one within age of one and twenty be returned, it is a good cauſe of Challenge. Witneſs. Infant.

Challenges arising from the Jurors own Act.

Upon his own Act, as if the Juror hath given a Verdict before, for the same cause, albeit it be reversed by Writ of Error, or if after Verdict, Judgment were arrested. So if he hath given a former Verdict upon the same Title or matter, though betweén other persons. But it is to be observed, that I may speak once for all, that in this or other like Cases, he that taketh the Challenge must shew the Record, if he will have it take place as a principal Challenge, otherwise he must conclude to the favour, unless it be a Record of the same Court, and then he must shew the day and terme.

Former Verdict.

So likewise one may be challenged, that he was Inditor of the Plaintiff or Defendant, either of Treason, Felony, Misprision, Trespass, or the like in the same cause.

Indictment.

If the Juror be Godfather to the Child of the Plaintiff or Defendant, or e converso, this is allowed to be a good Challenge in our Books.

Godfather.

If

If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant, in the same cause, and have been informed of, or treated of the matter, this is a principal Challenge. Otherwise if he were never informed nor treated thereof; and otherwise if he were indifferently chosen by either of the parties, though he treated thereof. But a Commissioner chosen by one of the parties, for examination of Witnesses in the same cause, is no principal cause of challenge; for he is made by the King under the great Seal, and not by the party as the Arbitrator is, but he may upon cause be challenged for favour. Arbitrator. Commissioner.

If he be of counsel, Servant, or of Robes, or Fee, or of either party, it is a principal Challenge. Counsel.

If any after he be returned, do eat and drink at the charge of either party, it is a principal cause of Challenge, otherwise it is of a Trior after he be sworn. Eat or drink at the parties charge.

Actions of malice.

Action brought either by the Juror against either of the parties, or by either of the parties against him, which may imply malice or displeasure, are causes of principal Challenge, unless they be brought by Coryn, either before or after the return; for if Coryn be found, then it is no cause of Challenge; other Actions which do not imply malice or displeasure, are but to the favour, as an Action of debt, &c. More 3.

Parson and Parishes.

In a cause where the Parson of a Parish is party, and the right of the Church cometh in debate, a Parishioner is a principal Challenge. Otherwise it is in debt, or any other Action where the right of the Church cometh not in question.

To labour the Jury.

If either party labour the Juror, and give him any thing to give his Verdict, 't is is a principal Challenge. But if either party labour the Juror to appear, and to do his Conscience, this is no Challenge at all, but lawful for him to do it.

That

That the Juror is a Fellow-Servant with either party, is no principall Challenge but to the favour. Fellow Servant.

Neither of the parties can take that Challenge to the Polls, which he might have had to the Array. To the Polls.

Note, if the Defendant may have a principal cause of Challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that case may for his own expedition, alledge the same, and pray Process to the Coroners, which he cannot have, unless the Defendant will confess it; but if the Defendant will not confess it, then the Plaintiff shall have a Venire facias to the Sheriff, and the Defendant shall never take any Challenge for that cause, and so in like cases. But on the part of the Defendant, any such matter shall not be alledged, and Process prayed to the Coroners, because he may challenge the Jury for that cause, and can be at no prejudice. *Venire facias* to the Coroners.

Challenge

Challenges to the favour.

Challenge concluding to the favour, when either party cannot take any principal Challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the Triors, upon hearing their evidence to finde him favourable, or not favourable. But yet some of them come nearer to a principal Challenge then other. As if the Juror be of kindred, or under the distress of him in the reversion or remainder, or in whose right the Avowrie or Justification is made, or the like: These be no principall Challenges, because he in Reversion, remainder, or in whose right the Avowry or Justification is, is not party to the Record; otherwise it is, if they were made parties by aid, Receipt, or Voucher, and yet the cause of favour is apparent; so it is of all principal causes, if they were party to the Record. Now the causes of favour are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the Reader to the reading of our Books con-

Favour.

concerning that matter. For all which the rule of Law is, that he must stand indifferent as he stands unsworn.

The Subject may challenge the polles, where the King is party. And if a man be out-lawed of Treason or Felony, at the Suit of the King, and the party for avoyding thereof alledgeth imprisonment, or the like, at the time of the Outlawry, though the Issue be joyned upon a collateral point, yet shall the party have such Challenges, as if he had been arraigned upon the crime it self, for this by a meane concerneth his life also. King.

Propter delictum, As if the Juror be attainted or convicted of Treason, or Felony, or for any offence to life or member, or in attaint for a false Verdict, or for perjury as a Witness, or in a conspiracy at the Suit of the King, or in any Suit (either for the King, or for any subject) be adiudged to the Pillory, Tumbrel, or the like, or to be branded, or to be stigmatique, or to have any other corporal punishment Challenges *propter delictum.*

Infamous.

ment whereby he becommeth infamous, (for it is a maxime in Law, Repellitur a sacramento infamis) these and the like are principal causes of challenge. So it is if a man

Outlawed.

be outlawed in trespass, debt, or any other action, for he is Exlex, and therefore is not legalis homo. And old Books have said, that if he be excommunicated, he could not be of a Jury.

See the Statutes of W. 2. and Artic. supra cartas, what persons the

Who ought to be on Juries.

Sheriff ought to return on Juries. And see F.N.B. breve de non ponendis in Assesis & juratis; and the Register in the same Writ. And see there what remedy the party hath that is returned against Law.

It is necessary to be known the

At what time Challenges must be taken.

time when the challenge is to be taken. First, he that hath divers challenges, must take them all at once, and the Law so requireth indifferent trials, and divers challenges are not accounted double. Secondly, if one be challenged by one party, if after he be tried indifferent, it is time enough for the other party to chal-

challenge him. Thirdly, after challenge to the Array, and tryal duly returned, if the same party take a challenge to the Polls, he must shew cause presently. Fourthly, so if a Juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworn. Fifthly, when the King is party, or in an appeal of Felony, the Defendant that challengeth for cause, must shew his cause presently. Sixthly, If a man in case of Treason or Felony, challenge for cause, and he be tryed indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the Hundred must be taken before so many be sworn, as will serve for Hundredors, or else he loseth the advantage thereof. Hundredors.

In a Writ of Right, the grand Jury must be challenged before the four Knights, before they be returned in Court; for after they be returned in Court, there cannot any challenge be taken unto them. Writ of Right.

Nota.

The Array of the *Tales*.

Nota. The Array of the Tales shall not be challenged by any one party, until the Array of the principall be tryed; but if the Plaintiff challenge the Array of the principall, the Defendant may challenge the Array of the Tales. After one hath taken a challenge to the Poll, he cannot challenge the Array.

Now it is to be seen how challenge to the Array of the principall Pannel, or of the Tales, or of the Polls shall be tryed, and who shall be tryors of the same, and to whom process shall be awarded.

Coroners.

If the Plaintiff alledge a cause of challenge against the Sheriff, the process shall be directed to the Coroners, if any cause against any of the Coroners, process shall be awarded to the rest, if against all of them, then the Court shall appoint certain Elisors, or Ellors (so named ab eligendo) because they are named by the Court, against whose return, no challenge shall be

Elisors.

taken

taken to the Array, because they were appointed by the Court, but he may have his challenge to the Polls. Note, if process be once awarded for the partiality of the Sheriff, though there be a new Sheriff, yet process shall never be awarded to him: for the entry is, In quod vicecomes se non intromittat. But otherwise it is, for that he was Tenant to either party, or the like.

If the Array be challenged in Court, it shall be tryed by two of them that be impannelled to be appointed by the Court: for the tryors in that case shall not exceed the number of two, unless it be by consent. But when the Court names two for some special cause alledged by either party, the Court may name others; if the Array be quashed, then process shall be awarded, ut supra. If there be a demur to a challenge, the Judge before whom the cause is to be tryed, may determine it, or adjourn it to be heard another time. Stiles 464. Vide Bulstr. 1. part. 114.

Array.

Two Tryors.

Demur to a Challenge, how determinable.

If

Array of the Principall and *Tales.*

If a Pannel upon a Venire facias be returned, and a Tales, and the Array of the principall is challenged, the tryors, which try and quash the Array, shall not try the Array of the Tales; for now it is, as if there had been no appearance of the principall Pannel; but if the tryors affirm the Array of the principal, then they shall try the Array of the Tales. If the Plaintiff challenge the Array of the principall, and the Defendant the Array of the Tales, there the one of the principall, and the other of the Tales shall try both Arrayes. For other matter concerning the Tales, see in Cokes Reports matters worthy of observation.

Two Tryors.

When any challenge is made to the Polls, two tryors shall be appointed by the Court, and if they try one indifferent, and he be sworn, then he and the two tryors shall try another; and if another be tryed indifferent, and he be sworn, then the two tryors cease, and the two that be sworn on the Jury shall try the rest.

If

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is ſworn, becauſe one cannot try alone, there ſhall be added to him one challenged by the Plaintiff, and the other by the Defendant. When the tryall is to be had by two Counties, the manner of the tryall is worthy of obſervation, and apparent in our Books. If the four Knights in the Writ of Right be challenged, they ſhall try themſelves, and they ſhall chooſe the grand Aſſize, and try the challenges of the parties. If the cauſe of challenges touch the diſhonor, or diſcredit of the Juror, he ſhall not be examined upon his Oath, but in other caſes he ſhall be examined upon his Oath, to informe the tryors. If an Inqueſt be awarded by default, the Defendant hath loſt his challenge; but the Plaintiff may challenge for juſt cauſe, and that ſhall be examined and tryed.

Tryall of Challenges.

Juror examined.

Whereſoever the Plaintiff is to recover per viſum juratorum, there ought to be ſix of the Jury that have

View.

had the view, or known the Land in question so as he be able to put the Plaintiff in possession, if he recover.

Challenges. In Proprietate probanda, and a Writ to inquire for waste, the parties have been received to take their challenges. But passing over many things touching this matter, I will conclude with the saying of Bracton, Plures autem aliæ sunt causæ recusandi juratores, de quibus ad præsens non recolo, sed quæ jam enumeratæ sunt, sufficiant exempli causa.

CAP.

CAP. X.

Of what things a Jury may inquire; when of ſpirituall; when of things done in another County, or in another Kingdom; when of Eſtoppels, and when not; when of a mans intent.

The next words in the Writ, which have not yet been taken notice of, are theſe, per quos rei veritas melius ſciri poterit; And this is the chief end of their meeting together: No Court can give a right Judgment, unleſs the truth of the fact be certainly known; and to finde out this truth, no way is like to this of Juries: for they do not onely go upon their own knowledge, though they are Neighbours to the place

Ex facto jus oritur.

where the question is moved, and so are presumed to have a better knowledge of the fact, then any others; For vicinus facta vicini presumitur scire; But least this presumption should fail, the Law allowes other Evidence to be given to them, by which, they may more certainly and confidently, give their Verdict of the Issue, which is meant by this word Rei.

And here, it will not be amiss to give you a brief description, de quibus rebus, what the Enquest may inquire of, and finde;

Of the Law. Wherefore, though it be true, that a Jury shall not be charged, nor meddle with a matter of Law, and if they do, and finde it, their Verdict as to this shall be void, yet daily experience (as well as Littleton, Sect. 368) tells us, that they may take upon them the knowledge of the Law, and give a generall Verdict; though to finde the speciall matter is the safest way for them, because, if they mistake the Law, they run into the danger of an

At,

taint. In many cases, the Jury are to inquire of the knowledge and intent of a man, as where the Nar. is that the Defendant kept a Dog which killed the Plaintiffs Sheep, Sciens canem suum ad mordendas oves consuetum; there though Sciens be not traversable, yet the Jury upon Evidence must inquire of it. lib. 4. 18.

Of a mans intent.

In some Cases, a Jury may try and finde a spiritual thing, as a Divorce, Matrimony, &c. and must take notice thereof, upon pain of Attaint, lib. 4. 29. lib. 9. lib. 7 43.

Of spiritual things.

The Jurors of one County, may finde any transitory thing done in another County: May sometimes they must finde locall things in another County, as if the Heir pleads siens per discent, and the Plaintiff replies, Assets in a Parish and Ward within London, the Jury may finde Assets in any County; In the same case against an Executor, who pleads plene administravit, the Jury may likewise finde Assets in any

In Trespass *Quare Clausum fregit*, in the County of D. upon not guilty, If the Jury finde the Defendant guilty in the County of S. their Verdict is void. But if they finde him guilty generally, an Attaint lyeth. *Finch* 400.

Of things done in another County, or Country.

ny part of the World; And the Reason is, because the place is onely named for necessity of tryall. But where the place is part of the Issue, it is otherwise. And therefore if I promise in one place to do a thing in another, and Issue is upon the breach, the Jury ought to come from the place of the breach: But if I promise in London, to do a thing at Budeaux in France, and Issue upon the breach, yet this shall be tryed in London for necessity, because otherwise it would want tryall, and the Jury must inquire of the breach at Burdeaux. But if I promise in France, to do a thing in France, so that both Contract and performance is beyond Sea, this wants tryall in our Law. lib.6.47. li.7.23. 26.27.

Estoppels.

The Jury may finde Estoppels, as the taking of a Lease of a man's own Land, by Deed indented; or the delivery of a Deed before the date, as in Debt by an Administrator upon a Bond dated 4 Aprilis, 24 Eliz.

24 Eliz. The Defendant pleaded, that the Intestate dyed before the date of the Obligation, and issue sient son fait, upon which they were at Issue, and adjudged that the Jury might finde that the Bond was delivered the 3d of April, because they are sworn ad veritatem dicendum; though the parties are estopped to plead a Deed was delivered before the date; but they may plead a delivery after the date, because it shall never be intended, that a Deed was delivered before the date, but after it may.

But if the Estoppel, or admittance be within the same Record, in which Issue is joyned, then the Jurors cannot finde any thing contrary to this, which the parties have affirmed, and admitted of Record, though it be not true: For the Court may give Judgement upon matters confessed by the parties; and the Jurors are not to be charged with any such thing, but onely with such, in which the parties vary. li. 2. 4 li. 4. 53. Co. Lit. 227. Estoppels.

Records not shewed.

The Jury may finde Deeds, or matter of Record, if they will, though not shewed in Evidence. Finch 400. They may inquire of things done before the memory of man. lib. 9. 34.

Warranty.

The Jury may finde a Warranty, being given in Evidence, though it be not pleaded: Nay the Jury may finde that, which cannot be pleaded, as in Trespass, upon not guilty; The Jury may finde that the Defendant leased Lands for life, upon Condition, and entred for the Condition broken; Though this cannot be pleaded without Deed, yet the Jury may finde it. Lit. Sect. 366.

But this matter comes more properly under the title Evidence; wherefore we will proceed to that.

CAP.

CAP. XI.

Evidence.

EVidence, Evidentia; This word in legall understanding (saith Coke 1. Inst. 283.) doth not onely contain matters of Record, as Letters Patents, Fines, Recoveries, Inrollments, and the like, and Writings under Seal, as Charters and Deeds, and other Writings without Seal, as Court-Rolls, Accounts, and the like, which are called Evidences Instrumenta. But in a larger sense, it containeth also Testimonia, The Testimony of Witnesses, and other proofs, to be produced and given to a Jury for the finding of any Issue, joyned between the parties; And it is called Evidence, because thereby the point in Issue is to be made evident to the Jury: Evidence.

Jury: Probationes debent esse evidentes (id est) perspicuæ & facile intelligitur.

And this Evidence (with Bracton) we may terme probatio duplex, viz. viva, as Witnesses, viva voce; and Mortua, as by Deeds, Writings, and Instruments; and violenta presumptio, in many cases, is plena probatio, and therefore if all the Witnesses to a Deed be dead, then the Deed shall receive Credit, per collationem sigillorum Scripturæ, &c. but especially, if there hath been a continuall and quiet possession; which is a violent presumption. 1 Inst. 6. for no man can keep his Witnesses alive.

Presumption.

Men that are so branded with Infamy, that they cannot be Jurors, (for which see before, who may be Jurors) cannot be Witnesses; The Wife cannot be a Witness for, or against her Husband, neither can the party to the usurious Contract, be a Witness against the Usurer, in an Information upon the Statute of Usury. But Kinsmen never so near,

Who may be Witnesses.

near, Tenants, Servants, Masters, Counsellors, and Attorneys, &c. may be Witnesses. A Counsellor, may be a Witness to the Agreement, &c. but not to validity of an assurance, nor to the Counsel he gave. March. Rep. 43. If a Witness being served with Process, and having money sufficient to bear his charges, (or lesse, if he accept it) do not appear to give his testimony, he forfeits 10 l. to the party dampnified, and must recompence his dammages. 5 Eliz. 9. If a Witness commit wilful perjury, he loseth 20 l. shall be imprisoned 6. months without bail, stand in the Pillory, and be disabled to be a Witness; so shall the suborner, who procures the perjury. 5 Eliz. 9.

Records. Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence; and so may any thing done in the County-Court, Court-Baron, or Hundred-Court, &c. be proved by Witnesses.

Fine. A Fine, or common Recovery, may be given in Evidence, though it be not under the great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the part indented is the usuall Evidence that there is such a Fine, though they which saw the Fine, are also good Evidence. Plow. 410. Stiles 22.

Depositions. Depositions in the Ecclesiastical Court cannot be given in Evidence, though parties be dead. March 120. A Defendants answer in an English Court, is good Evidence against him, but not against others. Godbolt, 326. Where the Evidence proves the effect and substance of the Issue, it is good.

Affets. As upon plene administravit, if it be proved that the Executor hath goods of the Testator in his hands, he may give in Evidence, that he hath paid of his own money for the Testator, to the value of those goods. Co. Lit. 283.

Lease. So if a Lease be pleaded, a Lease upon Condition is good Evidence.

1 H. 8.

1 H. 8. 20. because the Genus comprehends the Species. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence. 44 E. 3. 39. A speciall Agreement, is evidence for an agreement. Plo. 8.

But if a Feoffment be pleaded in Fee, upon Issue non feoffavit modo & forma, a Feoffment upon Condition is no Evidence, because it doth not answer the Issue; and wheresoever Evidence is contrary to the Issue, and doth not maintain it, the Evidence is not good. 11 H. 4. 3. Feoffments 41. Feoffments

Upon an Assumpsit to the Husband, an Assumpsit to the Wife, and his agreement, is good Evidence. 27 H. 8. 29. Assumpsit.

In Challenge to the Array, because made at the denomination of the Sheriffs Clerk, Evidence at his Bayliffs denomination, is good, because favourably made is the substance. 38 H. 6. 9. Challenge.

If

Affets. If the Iſſue be a Suit againſt an Executor, Adminiſtrator, or Heir, Affets in London; to prove Affets in any other place, is ſufficient. li. 6. 47. Dyer 271.

Accompt. Accompt pleaded before two; Accompt before one, is good Evidence. Hob. 55. becauſe the Accompt is the ſubſtance.

What Evidence upon the generall Iſſue. Upon the general Iſſue, the Defendant may give any thing in Evidence, which proves the Plaintiff hath no cauſe of Action, or which doth intitle the Defendant to the thing in queſtion.

Detinue. But if he hath cauſe of juſtification or excuſe, it muſt be pleaded: wherefore upon non detinet, in detinue, the Defendant may give in Evidence a gift from the Plaintiff; for that proveth that he doth not detain the Plaintiffs goods; but he cannot give in Evidence, that the Goods were pawned to him for money, and that it is not paid, but he muſt plead it. 1 Inſt. 283.

In Battery. Upon Not guilty, in Battery, Son aſſault demeſne, is no Evidence; for thereby the Battery is confeſſed. Ib. neither

neither is Not guilty, good Evidence upon Son assault demesne.

Upon Not guilty, in Tresspass, Insufficiency of the Plaintiffs mounds, or to justifie for a Rent-Charge, Common, or the like, is no good Evidence. Ib. Tresspass.

So upon the Plea, Nul waste fait, in an Action of Waste, he may give in Evidence any thing that proveth it no Waste, as by Tempest, by Lightning, by Enemies, &c. But he cannot give in Evidence any justifiable Waste, as to repair the House, or the like; nor a reparation of the Waste, before the Action brought. Ib. Waste.

Upon non est factum, 'Tis no Evidence, to shew that the Bond was made upon an usurious Contract, or that the Sheriffs name is mistaken, &c. in a Bail-Bond, or that the Bond is joynt, or that it is void by Statute. But it must be pleaded in abatement. Ib. Hob. 72. Non est factum.

But to prove that the Seal was broken off, and put on again; or to prove a Rasure of the Deed; this is good

good Evidence. li. 5. 119. 11. 27. If 'twere done before the Action brought; but if the Seal was broke off, &c. by chance, after Issue joyned, the Jury may finde it specially.

Trover. Upon Not guilty, in Trover and Conversion, a Demand, and denyall of the Goods, is good Evidence. Plo. 14. li. 10. 57. Cro. 1 part. ult. pub. 495. Hob. 187.

Plene. Administravit. Upon plene administravit, the Executor cannot give a Judgement in Evidence. Kelw. 59. nor payment of Debts by Contract, in debt brought upon an Obligation, upon nil debet. in Debt for Rent, That the Lessor entred into part of the Land, is no good Evidence. Goldſ. 81. But, non demisit, is, 9 H. 7. 3.

Parco fracto. Upon Not guilty, in an Action upon the Statute de parco fracto, That the Plaintiff hath no Park, is good Evidence. 19 H. 8. 9.

Warren. So upon Not guilty, in Trespass, in the Plaintiffs Warren, Evidence that he hath no Warren, is good. 10 H. 6. 17. Kitchin 119.

Shop-books. A Shop-book no evidence after a year. 7 Jac. cap. 12. In

In debt for Arrerages of an accompt upon Nil debet modo & forma; No accompt is good Evidence. 2 H.6. 26. Upon Not guilty in trespas, a Lease for years, 12 H.8.2. or that locus in quo, &c. is the Freehold of another, 4 E. 45. is good evidence; but upon this he cannot justifie his entry upon the place by a strangers Licence, or Command, br. generall Issue 81. because this is a Justification by way of excuse: Neither is a Lease at Will, good evidence in this case. Accompt. Trespass.

So upon not guilty, in trespass for goods, 'tis good evidence that the goods were a strangers. 9 H. 6. 11. But that they were a strangers, and that he as Servant to the stranger, or by his commandment, took them from the Plaintiff, is not good, br. generall Issue 81. because the trespass is confessed. But that the stranger gave them to the Defendant is good. 9 H.6. 11. Not guilty in Trespass.

If the Defendant plead payment to a Bond or Bill, and it appeares Payment by presumption.

peares the debt is very old, and it hath not been demanded, nor any use paid for it many years, common presumption is good evidence, that the money is paid, and the Juries use to finde for the Defendants, in such cases.

Trespass another day.

If the trespass were in truth done the 4th of May, and the Plaintiff alledgeth the same to be done the 5th of May, or the first of May, when no trespas was done; yet if upon evidence, it falleth out that the trespass was done before the Action brought, it sufficeth. 1 Inst. 283.

Deed.

'Tis dangerous to permit Evidence to a Jury by Witnesses, that there was such a Deed, which they have seen or read, or prove the Deed by a Copy, because the Deed may be upon Condition, limitation, or power of Revocation; and if this should be permitted, the whole Reason of the Common Law, in shewing Deeds to the Court, would be subverted; for the Deed might be imperfect, and void,

which

which the Witnesses could not perceive; yet in cases of extremity, as where the Deed was burned, or lost by some other notorious accident, the Judges may at their discretion, allow them to be proved by Witnesses. li. 10. 92.

In Case against an Executor; whereas the Testator was indebted to the Plaintiff, the Executor promised to pay the debt, in consideration the Plaintiff would forbear to sue him; the Executor may give in evidence upon Non assumpsit, that there was no debt, or that he had no assets tempore promissionis, for then there would be no Consideration. li. 9. 94. William Banes Case. Executor.

Evidence shall never be pleaded, but the matter of fact shall be pleaded, and if it be denied, the evidence shall be given to the Jury, not to the Court. lib. 9. 9. Evidence.

Evidence, that the Wife of every Copy-holder, shall have the Land

durante viduitate, will not maintain the Issue, that the Custom of a Mannor is, that she shall have the Land during her life, after her Husbands death, because, though durante viduitate, imports an Estate for life, yet an Estate durante vita, is more large & beneficiall. li.4.30.

Estate for life.

What may be given in Evidence.

Things done before the memory of man, in another County, or in another Kingdom, may be given in Evidence to a Jury, as Assets in another County, &c. More 47. See li.4.22.9.27.28. & 34. li.6.46,47.

Payment.

Upon Issue, payment at the day; payment before or after the day, is no Evidence. More 47. but upon Nil debet, it is good Evidence, because it proves the Issue.

Upon Issue, Assets or no Assets, or seised, or not seised, if one give a Feoffment, &c. in Evidence, Covin may be given in Evidence, by the other, but not if the Issue be infeoffed, or not infeoffed, for it is a Feoffment tiel quel, though made by Covin. li.5.60. Hob.72.

Covin.

Doomesd y-book.

The Book of Doomesday brought in

in Court, is good Evidence to prove the Land, to be ancient Demesne, Hob. 188.

In Attaint, the Plaintiff shall not give more evidence, nor examine more Witnesses, than was before, but the Defendant may. Dyer 212. Attaint.

Copies of the Court-Rolls, are the onely evidence for Copy-holders, for (as Littleton, Sect. 75. tells you) They are called Tenants by Copy of Court-Roll, because they have no other Evidence, concerning their Tenements, but only the Copies of Court-Rolls. But Coke explains the Text, and sayes, This is to be understood of Evidences of Alienation; for a Release of a right by Deed. A Copy-holder (that cometh in by way of admittance) may have, and that is sufficient to extinguish the right of the Copy-holder which he that maketh the Release had. Court-Rolls for Copy-holders.

In Actions upon the Case, tresspass, battery, or false imprisonment against any Justice of Peace, Major, or Bayliff of City, or

Special Evidence upon the generall Issue, by whom.

Town Corporate, Headborough, Portreve, Constable, Tythingman, Collector of Subsidy or Fifteen, in any of his Majesties Courts at Westminst. or elsewhere, concerning any thing done by any of them, by reason of any of their Offices aforesaid, and all other in their aid or assistance, or by their Commandment. &c. They may plead the generall Issue, and give the speciall matter of their excuse, or justification in Evidence. 7 Jac. cap. 5.

Statutes.

Generall Acts of Parliament, may be given in Evidence, and need not be pleaded; and so may generall Pardons given by Parliament, if they be without Exceptions; But commonly advantage of the Act is given by the Act it self to the offender, without pleading it. as by the late (most truly so called) generall act of Indempnity, every person thereby pardoned, may plead the generall Issue, and give the Act in evidence, for his discharge, which are generall, and which particular Statutes, see lib. 4. 76.

Pardons.

Upon

Upon not guilty in Trover, the Defendant may give in Evidence, that the goods were pawned to him for 10 l. That he diſtrained them for Rent, or damage feaſant, That as Sheriff, he levied them upon Execution, or that he took them, as Tythes ſevered. Cro. 1 part. 157. 3 part. 435. Hob. 187. Trover.

If there be two Batteries between Plaintiff and Defendant, at divers times, the Plaintiff is bound to prove the battery made the ſame day in the Declaration, and ſhall not be admitted to give another day in evidence, as the caſe may be. As in Battery, the Defendant pleaded, ſon aſſault Demeſne, and the Plaintiff replyed, de injuria ſua propria abſque tali ſua, and in evidence, the Defendant maintained, that the

If there be two Treſpaſſes, and the Defendant pleads a Juſtification; if the Plaintiff replies *de injuria ſua propria, &c.* he cannot give in Evidence a Treſpaſs at another time; But he ſhould have replyed, that at another time, in the ſame day of his Count, the Defendant did the other Treſpaſs, *&c.* to which the Defendant may plead another Juſtification, but the Plaintiff cannot then plead a Treſpaſs at another time, but muſt conclude *Sans tiel cauſe, &c.*

Plaintiff beat him the day mentioned in the Declaration, and in the same place, which the Plaintiff perceiving, he gave in evidence, that the battery was made another day, and place, to which the Defendant demurred, upon the difference aforesaid. Brownlow. 1 part. 233. 19 H. 6. 47. But upon not guilty, it is otherwise, though there be never so many batteries between the parties. Littleton, Sect. 485.

Prohibition for suing for Tythes in Bocking Park in Essex, and surmised, that the Lands were parcel of the possessions of the Pryory of Christs Church in Canterbury, and that the said Pryor & his Predecessors had held it discharged of Tythes tempore dissolutionis, and pleaded the Statute of 31 H. 8. The Defendant pleads, that the Pryor and his Predecessors, did not hold them discharged, and upon Issue joyned thereon, the Evidence was, that the Pryor, or his Predecessors, time out of minde, &c. never paid Tythes;

A non Decimando.

but

but no cauſe was ſhewn, either by unity of poſſeſſion, reall Compoſition, or other cauſe to ſhew it diſcharged: Coke ſaid it was no Evidence; for it is a preſcription in non decimando, Curia contra; For a ſpirituall man may preſcribe in non decimando, and by the Statute of 31 H.8. he ſhall hold it diſcharged, as the Prior held it; and if he held it diſcharged, non refert, by what means; for it ſhall be intended by lawful means, & the Jury afterwards found for the Plaintiff. Cro. 3. parr. 206.

In *nil debet*, upon the Statute for tythes, a Lay perſon cannot give a *Non decimando* in evidence, ſo may the King, and any other ſpiritual perſons. li. 2. B. of *Wincheſters* Caſe.

Upon non aſſumpſit, in a generall Indebitatus aſſumpſit, the Defendant may give in evidence, payment at any time, before the Action brought, but upon a ſpeciall promiſe to pay mony, &c. it is otherwiſe, Cauſa patet; for in the firſt Caſe, if there be no debt, the Law will infer no promiſe.

Indebitatus aſſumpſit.

If a Church-Book, or any thing elſe is given in evidence, which ought not to be allowed, the Court above cannot quaſh the Verdict,

dict, except it be certified and returned with the Postea. Brownlow. 1 part. 207. But the Court may order a new Tryall, upon cause shewed, as for excessive damages, &c.

Postea 26. Assise. pl. 4.

CAP. XII.

The Juries Oath; why called Recognitors in an Assise, and Jurors in a Jury; of the Tryal *per medietatem linguæ*; when to be prayed, and when grantable. Of a tryal betwixt two Aliens, by all *English*. Of the *Venire facias*, *per medietatem linguæ*, and of Challenges to such Juries.

THe Jury having heard their Evidence, let them now consider of their Verdict; But first they must remember their Oath, which in effect is, to finde according to their

Assise, Enquest, and Proof, are taken for the word Jury. vide 28 E. 3. 13.

their Evidence; and therefore they should have had it before the Evidence, but that the form and order of the Venire facias, (which I have tyed my self to follow,) Leads me to it after their Evidence, in these words; Ad faciend. quandam Juratam; I have already shewed the derivation of this word Jurata, and what is the legall acceptation of it; only observe with our great Master Littleton, That the word Assize, is sometimes taken for a Jury, so as the Learned Commentator doth well paraphrase, That the word Assise, is Nomen Æquivocum Æquivocans, because sometime it signifieth a Jury. sometime the Writ of Assise, and sometime an Ordinance, or Statute; But Jurata, is Nomen Æquivocum Æquivocatum, because we alwayes understand that word (according to the aforesaid definition) to be a Jury of twelve men, so called, by reason of the Oath they take, Truly to try the Suit of Nisi prius, between party and party, according to their Evidence.

See Chap. 1.

1 Inst. 154.

Assisa for *Jurata.*

The Juries Oath.

And

Why called Recognitors in an Aſſiſe, and Jurors in a Jury.

And as in an Aſſiſe, the Jurors are called Recognitors, from theſe words in the Writ of Aſſiſe, facere Recognitionem; ſo upon a Niſi prius, they are called Juratores, from theſe words in the Venire facias, Ad faciend. quandam Juratam.

12 Knights.

In ancient time, the Jury, as well in Common Pleas, as in Pleas of the Crown, were 12. Knights, as appeares by Glanvill, lib. 2. cap. 14. and Bracton, fol. 116.

The next words of the Venire facias, are Inter partes predictas. In the fourth Chapter, I have inſtanced, That in ſome Caſes, a Jury ſhall be awarded betwixt the party, and a ſtranger to the Writ, and Iſſue; I will now ſhew what the Jury ſhall be, when one of the parties is an Alien, the other a Denizen; and when both parties to the Iſſue are Aliens.

Jury per medietatem linguæ.

This Tryal is called in Latine, Triatio bilinguis, or per medietatem linguæ. And this Tryall by the Common Law was wont to be obtained of the King, by his Grant made

made to any Company of ſtrangers, as to the Company of Lumbards, or Almaignes, or to any other Company, that when any of them was impleaded, the moyety of the Juqueſt ſhould be of their own tongue. Stan. Plea, Cor. lib. 3. cap. 7.

And this Tryal in ſome Caſes, per medietatem linguæ, was before the Conqueſt, as appeares by Lamb. fol. 91. 3. Viri duodeni Jure conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis Jus dicanto. And of ancient time, it was called Duodecim virale Judicium. 1 Inſt. 155. Its antiquity.

But afterwards, this Law became univerſall: firſt by the Statute of 27 Ed. 3. cap. 8. It was Enacted, that in Pleas before the Maior of the Staple, if both parties were ſtrangers, the Tryal ſhould be by ſtrangers. But if one party was a ſtranger, and the other a Denizen, then the Tryal ſhould be per medietatem linguæ. But this Statute extended but to a narrow Compaſs, to wit, onely where both parties were Merchants or Miniſters of the

the Staple, and in Pleas before the Maior of the Staple. But afterwards, in the 28th Year of the same Kings Reign, cap. 13. It was Enacted,

That in all manner of Enquests and proofs, which be to be taken or made amongst Aliens, and Denizens, be they Merchants, or other, as well before the Maior of the Staple, as before any other Justices, or Ministers, although the King *be party. The one half of the Enquest, or proof, shall be Denizens, and the other half Aliens, if so many Aliens and forraigners be in the Town, or place, where such Enquest or proof is to be taken, that be not parties, nor with the parties in Contracts, Pleas, or other quarrels, whereof such Enquests or proofs ought to be taken: And if there be not so many Aliens, then shall there be put in such Enquests*

queſts or proofs, as many Aliens, as ſhall be found in the ſame Towns or places, which be not thereto parties, nor with the parties, as aforeſaid is ſaid, and the Remnant of Denizens, which be good men, and not ſuſpitious to the one party, nor to the other.

So that this is the Statute which makes the Law univerſall, concerning the medietatem linguæ; for though the King be party, yet the Alien may have this Tryall. And it matters not, whether the Moyety of Aliens, be of the ſame Country as the Alien, party to the Action, is: for he may be a Portugal, and they Spaniards, &c. becauſe the Stat. ſpeaks generally of Aliens. See Dyer 144. King.

And the form of the Venire facias, in this Caſe is De vicenet. &c. Quorum una medietas ſit de Indigenis, & altera medietas ſit de alienigenis natis, &c. And the Sheriff ought to return 12. Aliens, and 12. *Venire facias per medietatem linguæ.*

De-

Denizens, one by the other, with addition which of them are Aliens, and so they are to be sworn. But if this Order be not observed, it is holpen as a mis-return, by the Statutes of 18 Eliz. Cro. 3. part 818. 841. So that Brooks sayes, it is not proper to call it a Tryall per medietatem linguæ, because any Aliens of any tongue may serve. But under his favour, I think it proper enough.

For people are distinguished by their Language, and Medietas Linguæ, is as much as to say, half English, and half of another tongue or Country whatsoever, though it be not materiall of what sufficiency the Jurors are, yet the form of the Venire facias, shall not be altered, but the Clause of Quorum quilibet habeat, 4 l. &c. shall be in, Cro. 3. part. 481.

But suppose that both parties be Aliens, of whom shall the Inquest be then? It is resolved, that the Inquest shall be all English, for though the English may be suppo-

sed

ſes to favour themſelves more than ſtrangers, yet when both parties are Aliens, it will be preſumed, they favour both alike, and ſo indifferent. 21 H. 6. 4.

All Engliſh.

Where an Alien is party, yet if the Tryall be by all Engliſh, it is not erroneous, becauſe it is at his perill, if he will ſlip his time, and not make uſe of the advantage which the Law giveth him when he ſhould. Dyer 28.

When the Alien ſhould pray a *Venire facias per mediatatem.*

The Alien ought to pray a Venire facias, per medietatem linguæ, at the time of the awarding the Venire facias: But if he doth it at any time before a generall Venire facias be returned and filed, the Court may grant him a Venire facias, de novo. Dyer 144. 21 H. 7. 32. though it hath been queſtioned.

Tales.

But if he hath a generall Venire facias, he cannot pray a Decem tales, &c. per medietatem linguæ, upon this; becauſe the Tales ought to perſue the Venire facias. 3 E. 4. 11, 12. And ſo if the Venire facias be per medietatem linguæ, the Tales

[Tales.

ought to be per medietatem linguæ, as if 6. Denizens, and 5. Aliens appear of the principal Jury, the Plaintiff may have a Tales, per medietatem linguæ, li. 10.104. But if in this case the Tales be generall, de circumstantibus, it hath been held good enough; for there being no exception taken by the Defendant, upon the awarding thereof, it shall be intended well awarded. Cro. 3. part. 818. 841.

If the Plaintiff or Defendant be Executor or Administrator, &c. though he be an Alien, yet the Tryal shall be by English, because he sueth in aut droit; but if it be averred that the Testator, or intestate, was an Alien, then it shall be per medietat. linguæ. Cro. 3. part 275.

Where the tryall of an Aliens cause shall be by English.

Part English, and part Aliens.

Mich. 40. & 41 Eliz. The Queens Attorney exhibited an Information against Barre, and divers other Marchants, some whereof were English, and some Aliens: After Issue, the Aliens prayed a Tryal per medietat. linguæ. But all the Justices of England resolved, that the Tryall

should

should be by all English, and likened it to the case of priviledge, where one of the Defendants demands priviledge, and the Court, as to his Companion cannot hold plea, there he shall be ousted of his priviledge, sic hic. More 557.

Challenge.

By the Statute of 8 H. 6. cap. 29. 29. Insufficiency, or want of Freehold, is no cause of Challenge to Aliens, who are impanneled with the Aliens, (notwithstanding Stamfords Opinion. Pl. Coron. 160) for this Statute saith, that the Stat. 2 H. 5. 3. shall extend onely to Enquests betwixt Denizen and Denizen.

When the Alien should pray a *Venire facias per medietatem.*

If the Defendant do not inform the Court that he is an Alien, upon awarding of the Venire facias, and so pray a Venire facias, per medietatem linguæ; he cannot challenge the Array for this cause at the Tryall, if the Jury be all Denizens (notwithstanding Stamfords Opinion to the contrary, and the Books cited

by him, fol. 159. pl. Cor.) For the Alien at his peril should pray a Venire facias, per medietatem linguæ, Dyer 357.

CAP. XIII.

The Learning of Generall Verdicts, Speciall Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inquest shall be taken by default.

Verdict. VErdit or Verdict; In Latine, Vere dictum, quasi dictum veritatis, As Judicium, est quasi Juris dictum; Is the Answer and Resolution of those 12. men, concerning the matter of fact referred to them by the Court, upon the Issue of the parties. And this is the foundation, upon which the Judgement of the Court is built, for ex facto jus oritur;

oritur; the Law ariſeth from the fact; Wherefore it is no wonder, that the Law hath ever been ſo curious, and cauteleus, as not to believe the matter of fact, untill it is ſworn by 12. ſufficient men, of the Neighbourhood where the fact was done, whom the Law ſuppoſeth to have moſt cogniſance of the truth, or falſehood thereof: which being ſworn (for the words are, Juratores predict. dicunt ſuper ſacrum ſuum, &c.) is the Verdict, whereof we now treat; And ſuch credit doth the Law give to Verdicts, that no proof will be admitted to impeach the verity thereof, ſo long as the Verdict ſtands not reverſed by Attaint; and therefore upon an Attaint, no Superſedeas is grantable by Law, Plo. Com. 496.

The Credit of Verdicts.

And it is worth our obſervation, that the Law ſeems to take more care of the fact, then of her ſelf; for the Major part of the Judges give the Judgement of the Law, though the other Judges diſſent. But every one of the 12. Jurors muſt a-

gree together of the fact, before there can be a Verdict, which must be delivered by the first man of the Jury. 29 Assize. pl. 27.

Generall or speciall.

And this Verdict is of two kinds, viz. one generall, and the other speciall, or at large.

Generall Verdict.

The generall Verdict, is positively, either in the Affirmative, or Negative, as in Trespass, upon Not guilty pleaded; The Jury finde Guilty, or Not guilty; And so in an Assize of Novel disseisin, brought by A. against B. The Plaintiff makes his plaint, Quod B. disseisivit eum de 20 acris terræ, cum pertinentiis, The Tenant pleads, Quod ipse nullam injuriam seu disseisinam prefato A. inde fecit, &c. The Recognitors of the Assize do finde, Quod predict. B. in juste & sine judicio disseisivit predict. A. de predict. 20 acris terræ cum pertinentiis, &c. This is a generall Verdict. 1 Inst. 228.

Speciall Verdict.

A Special Verdict, or Verdict at large, is so called, because it findeth the special matter at large, and leaveth

leaveth the Judgement of the Law thereupon, to the Court, of which kinde of Verdict it is ſaid, Omnis Concluſio boni, & veri judicii ſequitur, ex bonis & veris premiſſis, & dictis Juratorum. And as a Special Verdict may be found in Common-Pleas, ſo may it alſo be found, in Pleas of the Crown, or Criminal Cauſes that concern life or member. 1 Inſtit. 226.

And it is to be obſerved, that the Court cannot refuſe a Special Verdict, if it be pertinent to the matter in Iſſue. 1 Inſt. 228. The Court cannot refuſe it.

It hath been queſtioned, whether the Jury could finde a Special Verdict, upon a ſpecial point in Iſſue, or no, as they might upon the generall Iſſue. But this queſtion hath been fully reſolved in many of our Books, firſt in Plo. Com. 92. It is reſolved, That the Jury may give a ſpecial Verdict, and finde the matter at large, en cheſcun iſſue en le monde, ſo that the matter found at large, tend only to the Iſſue joyned, and contain the certainty and A ſpecial Verdict may be found upon any Iſſue, as upon an *abſq; hoc*, &c.

verity thereof. lib. 9. 12.

And in 2 Inst. 425. upon Collection of many Authors, it is said, That it hath been resolved, that in all Actions, reall, personall, and mixt, and upon all Issues joyned, generall or speciall, the Jury might finde the special matter of fact, pertinent, and tending onely to the Issue joyned, and thereupon pray the discretion of the Court for the Law. And this the Jurors might do at Common Law, not onely in Cases between party and party, but also in Pleas of the Crown, at the Kings Suit, which is a proof of the Common Law. And the Statute of Westm. the 2d cap. 30. is but an affirmitive of the Common Law.

A Free-hold upon Condition, without Deed, may be found by Verdict, though it cannot be pleaded.

And as this special Verdict is the safest for the Jury, 1 Inst. 228. so in many Cases it is most advantagious to the party, and helps him where his own pleading cannot. As for example, saith Littleton, Sect. 366. 367. 368. Albeit a man cannot in any Action, plead a Condition, which toucheth and concernes a Freehold, without

without shewing writing of this; yet a man may be ayded, upon such a Condition, by the Verdict of 12. men, taken at large, in an Assize of Novel disseisin, or in any other Action, where the Justices will take the Verdict of 12. Jurors at large: As put the case, a man seized of certain Land in Fée; letteth the same Land to another, for terme of life, without Déed, upon Condition to render to the Lessor, a certain Rent, and for default of payment, a Re-entry, &c. By force whereof the Lessée is seised as of Freehold; and after, the Rent is behinde, by which the Lessor entreth into the Land, and after the Lessée arraign an Assize of Novel disseisin, of the Land against the Lessor, who pleads that he did no wrong, nor Disseisin. And upon this, an Assize is taken. In this case, the Recognitors of the Assize may say, and render to the Justices, their Verdict at large, upon the whole matter; as to say, that the Defendant was seized of the Land, in his Demesne as of Fée,

and

and ſo ſeized, let the ſame Land to the Plaintiff, for terme of his life, rendring to the Lessor ſuch a yearly Rent payable at ſuch a Feaſt, &c. Upon ſuch Condition, that if the Rent were behinde at any ſuch Feaſt, at which it ought to be paid, then it ſhould be lawfull for the Lessor to enter, &c. By force of which Leaſe, the Plaintiff was ſeized in his Demeſne, as of Freehold, and that afterwards, the Rent was behinde, at ſuch a Feaſt, &c. By which the Lessor entred into the Land, upon the poſſeſſion of the Leſſee. And pray the diſcretion of the Juſtices, if this be a Diſſeiſin done to the Plaintiff, or not. Then, for that it appeareth to the Juſtices, that this was no Diſſeiſin to the Plaintiff, inſomuch, as the Entry of the Lessor was congeable on him, The Juſtices ought to give Judgement, that the Plaintiff ſhall not take any thing by his Writ of Aſſize, and ſo in ſuch caſe, the Leſſor ſhall be ayded, and yet no Writing was ever made of the Condition;

tion: For as well as the Jurors may have Conuſance of the Leaſe, they alſo as well may have Conuſance of the Condition, which was declared and rehearſed upon the Leaſe.

In the ſame manner it is of a feoffment in Fee, or a guift in tail, upon Condition, although no Writing were ever made of it. And as it is ſaid of a Verdict at large, in an Aſſize, &c. In the ſame manner it is of a Writ of Entry, founded upon a Diſſeiſin, and in all other Actions, where the Juſtices will take the Verdict at large, there where ſuch Verdict at large is made, the manner of the whole Entry is put in Iſſue.

Generall Verdict.

Alſo in ſuch caſe, where the Enqueſt may give their Verdict at large, if they will take upon them the knowledge of the Law upon the matter, they may give their Verdict generally, as is put in their charge, as in the caſe aforeſaid, they may well ſay, that the Leſſor did not diſſeize the Leſſee, if they will, &c.

The

Eſtoppels.

The Jury may likewiſe finde Eſtoppel, which cannot be pleaded, as in the 2d Report, fol. 4. it well appeares, where one Goddard, Adminiſtrator of James Newton, brought an Action of debt againſt John Denton, upon an Obligation made to the Inteſtate, bearing date the 4th day of April, Anno 24 Eliz. The Defendant pleaded, that the Inteſtate dyed before the Date of the Obligation, and ſo concluded, that the ſaid Eſcript, was not his Deed, upon which they were at Iſſue.

And the Jury found that the Defendant delivered it as his Deed 30 July, Anno 23 Eliz. and found the Tenor of the Deed in hæc verba, Noverint univerſi, &c. Dat. 4. Aprilis, Anno 24 Eliz. And that the Defendant was alive 30 July, Anno 23. Eliz. And that he dyed before the ſaid date of the Obligation, and prayed conſideration of the Court, if this was the Defendants Deed, And it was adjudged by Anderſon, Chief Juſtice Windham, Periam, and Walmeſley, that this was his Deed,

And

And the Reason of the Judgement was, That although the Obligée, in pleading, cannot alledge the delivery before the date, as it is adjudged in 12 H.6.1. which case was affirmed to be good Law, because he is estopped to take an averment against any thing expressed in the Deed; yet the Jurors, who are sworn ad veritatem dicend. shall not be estopped. For an Estoppel is to be concluded to speak the truth, and therefore Jurors cannot be estopped, because they are sworn to speak the truth.

Note, that a Deed may be pleaded to be delivered after the date, but not before, because it shall not be intended, written before the date, which may be after the date, 12 H. 6. 1.

But if the Estoppel or Admittance be within the same Record in which the Issue is joyned, upon which the Jurors give their Verdict, there they cannot finde any thing against this, which the parties have affirmed, and admitted of Record, although it be not true; For the Court may give Judgement upon thing confessed by the parties, and the Jurors are not to be charged with any such thing, but onely with things

As in Waste supposed in *A.* to plead that A is a hamlet in *B.* and not a Town of it self, admitteth the Waste, *&c.* 9 H. 6. 66. and the Jury cannot finde no Waste, for that would be against the Record.

things in which the parties vary, Ib. li. 5. 30.

Estoppel. So Estoppels, which binde the Interest of the Land, as the taking of a Lease of a mans own Land, by Deed intended, and the like, being

Cro. 1. part. 110. Lib. 4. 53. specially found by the Jury, the Court ought to judge, according to the speciall matter; for albeit, Estoppels regularly must be pleaded and relyed upon, by apt conclusion, and the Jury is sworn ad veritatem dicend. yet when they finde veritatem facti, they persue well their Oath, and the Court ought to adjudge according to Law. So may the Jury finde a Warranty, being given in evidence, though it be not pleaded, because it bindeth the right, unless it be in a Writ of Right, when the Mise is joyned upon the meer right. 1 Inst. 227.

Warranty not pleaded.

Uncertain Verdicts. Verdicts ought to be such, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding matter incertainly, or ambiguously, are insufficient and voyd

voyd, and no Judgement shall be given thereupon: As if an Executor plead Plene Administravit, and Issue is joyned thereon, and the Jury finde that the Defendant hath Goods within his hands to be administred, but finde not to what value, this is an uncertainty, and therefore an insufficient Verdict. li. 9. 74. 1 Inst. 227.

It is the Office of the Jurors, to shew the verity of the fact, and leave the Judgement of the Law to the Court. And therefore upon an Indictment of murder, quod felonice percussit, &c. If the Jury finde per percussit tantum, yet the Verdict is good, for the Judges of the Court are to resolve upon the special matter, whether it was felonice, and so murder, or not. li. 9. 69. And if the Court adjudge it Murder, then the Jurors in the conclusion of their Verdict, finde the Felon guilty of the murther contained in the Indictment. The Office of the Jury.

A Verdict that findes part of the Issue, and findibg nothing for the rest, Verdict finding part of the Issue.

reet, is insufficient for the whole, because they have not tryed the whole Issue, wherewith they are charged; As if an Information of intrusion, be brought against one, for intruding into a Messuage, and 100 Acres of Land, upon the generall Issue, the Jury finde against the Defendant for the Land, but say nothing for the House, this is insufficient for the whole.

More 406.

Finding more than the Issue.

But if the Jury give a Verdict of the whole Issue, and of more, &c. That which is more, is surphisage, and shall not stay Judgement: for Utile per inutile non vitiatur, Leon. 1 part. 66. Cro. 1 part. 130. But necessary incidents required by Law, the Jury may finde.

Where the Verdict ought to be of more than is in the Issue.

Yet in many Cases, (nay almost in all) the Jury ought to finde more than is put in Issue, otherwise their Verdict is not good; and therefore they are to assess Damages and Cost, because it is parcel of their Charge, as a Consequent upon the Issue, though it be not part of the Issue in terminis. li. 10. 119.

So

So in Treſpaſs againſt two, one comes, and pleads Not guilty, and is found guilty. In this caſe, the firſt Inqueſt ſhall aſſeſs damages for the whole Treſpaſs, by both Defendants; and afterwards, the other comes, and pleads Not guilty, and is found guilty: The finding of Damages by the firſt Inqueſt, to which he was not party, ſhall binde him; and therefore if the Damages are outragious, and exceſſive, the Defendant in the laſt Enqueſt, ſhall have an Attaint. li. 10. 119.

Damages by the firſt Inqueſt.

Attaint.

So in Treſpaſs, Quare clauſum fregit, if Iſſue be joyned upon a Feoffment, and the Jury give outragious Damages, An Attaint lies; for the inquiry of Damages is conſequent and dependant upon the Iſſue, and parcel of their charge. ib.

In the 11th Report, fo. 5. It was reſolved, that in Treſpaſs againſt two, where one comes and appears, &c. againſt whom the Plaintiff declares with a ſimul Cum, &c. who

Damages by the firſt Inqueſt.

pleads and is found guilty, and Damages assessed by the Enquest, and afterwards the other comes and pleads, and is found guilty: The Defendant which pleaded last, shall be charged with the Damages taxed by the first Inquest; for the trespass which the Plaintiff had made joynt by his Writ, and Count, and done at one time, cannot be severed by the Jurors, if they finde the trespass to be done by all, at one and the same time as the Plaintiff declared.

Severall damages.

So in Trespass against divers Defendants, if they plead not guilty, or severall Pleas, and the Jury finde for the Plaintiff in all, the Jurors cannot assess several Damages against the Defendants, because all is but one Trespass, and made joynt by the Plaintiff, by his Writ and Count. And although that one of them was more malicious, and de facto, did more and greater wrong than the others, yet all came to do an unlawful act, and were of one party, so that the act of one, is the act

as of all, of the same party being present. But in trespass against two, if the Jurors finde one guilty, at one time, and the other at another time, there severall Damages may be tared. But if the Plaintiff bring an Action of Trespass against two, and declare upon a several Trespas, his Action shall abate. And this is the diversity betwéen the finding of the Jury, and the confession of the party.

And in trespass, where the Defendants plead several Pleas, all tryable by one Jury, and they finde generally for the Plaintiff, the Jurors cannot sever the Damages; if they do, their Verdict is vicious.

But in trespass against two, where one appeares, and pleads not guilty to a Declaration against him, with a simul Cum, &c. and afterwards the other appears, and pleads not guilty to a Declaration against him also, with a simul Cum, &c. Whereupon two Venire fac. issue out, and one Issue tryed after the other, and severall Damages

Judgment *de melioribus dampnis.*

assessed: in judgement of the Law, the severall Juries give one Verdict, all at one time, and the Plaintiff hath his Election to have judgment de melioribus dampnis, by any of the Inquests. And this shall binde all, but fiat nisi unica Executio.

Damages.

It is a Maxim, that in every case where an Inquest is taken by the Mise of the parties, by the same Inquest shall damages be tared for all: And in Mich. 39 H. 6. fo. 1. In an Action of Trespass against many, (who pleaded in Barr the Terme before) and one of them made default, which was Recorded, There it is Resolved by all the Court, that for saving of a Discontinuance, a Writ of Enquiry of Damages shall be awarded, but none shall issue out, because he shall be contributory to the damages tared by the Inquest, at the Mise of the parties, if it be found for the Plaintiff; and if it be found against the Plaintiff, then the Writ of Enquiry shall issue forth.

Writ of Inquiry.

And

And the Reason wherefore no Writ shall issue out at first, to inquire of damages untill, &c. is, because that if a Writ should issue out, and be executed, this is nothing but an Inquest of Office, and not at the Mise of the parties, and yet this Inquiry (if it might be allowed) ought to serve for all the damages; For inquiry of damages, shall not be twice, and the others which have pleaded to Inquest, if the Issue be found against them, shall be chargeable to those damages which are found by the Inquest of Office, and if they be excessive, they shall have no remedy, although there be no default in them; for they cannot have an Attaint, because it is but an Inquest of Office.

But in trespass against two, who plead not guilty, &c. severally; and severall Venire fac: awarded. The Inquest which first passes, shall assess damages for all, and the second Inquest ought not to assess damages at all, but that Defendant shall be

Damages by the first Inquest.

contributory to the damages assessed by the first Jury, notwithstanding he is not party to it; yet if these damages be excessive, he shall have an Attaint, (because though he is a stranger to the Issue, yet in Law, he is privy in Charge.) And so no damage or mischief can accrue to him in this Case.

Verdict, when to be supplyed, by Writ of Inquiry, &c.

Now let us see, when something is left out of the Verdict which the Jury ought to have inquired of, whether it may be supplyed by matter ex post facto; and how: And for this, know, that if damages be left out of a Verdict, this omission cannot be supplyed, by Writ of Inquiry of damages: for this would prevent the Defendant of his Remedy by Attaint, which would be very mischievous; for then such omission might be on purpose, to deprive the Plaintiff of his Attaint, li. 10. 119.

And the Rule is, that when the Court ex officio, ought to inquire of any thing, upon which no Attaint lies,

lies, There the omiſſion of this, may be ſupplyed by a Writ of Inquiry of damages; as in a Quare impedit, if the Jury omit to enquire of theſe 4. things, that is to ſay, de plenitudine, ex cujus preſentatione, ſi tempus ſemeſtre tranſierit, and the value of the Church per annum, there the Plaintiff may have a Writ to inquire of theſe points. Dyer 241. 260. becauſe of theſe no Attaint lies, as it is holden in 11 H. 4. 80. becauſe that as to theſe, the Inqueſt is but of Office. But in all caſes, where any point is omitted, whereof an Attaint lyeth, there this ſhall not be ſupplyed by Writ of Inquiry, upon which no Attaint lyeth. And therefore in Detinue, if the Jury finde Damages and Coſt, and no value, as they ought, this ſhall not be ſupplyed by Writ of Inquiry of damages, for the Reaſon aforeſaid. Ib. Et ſic in ſimilibus.

But how then? What, ſhall the Plaintiff loſe the benefit of his Verdict, becauſe the Jury aſſeſſed no damages, (or did inſufficiently aſſeſs them)

Verdict ſet aſide, becauſe the damages not well aſſeſſed.

them). Certes in such Cases where damages onely are to be recovered, he must lose the whole benefit of his Verdict; but where any thing else is to be recovered, besides damages, as in Debt, Ejectment, &c. he may release his Damages, and have Judgement upon his Verdict as to the rest. And so where damages are to be recovered, if part of them are assessed insufficiently, and part well, he may have Judgement for those damages well assessed. And oftentimes the insufficiency of the Declaration shall set aside the Verdict; as if an Action upon the Case be brought upon two promises, and one of them be insufficiently laid, and the Verdict give intire Damages, this is naught for the whole; But if the Damages had been severally assessed upon the severall premises, then the Verdict as to the promise well laid, should have stood.

Verdict set aside in part.

In the 11th Report fo. 56. Marsh brought a Writ of Annuity against Bentham, and the parties discended to

to iſſue, which was tryed for the Plaintiff, and the Arrerages found, &c. But the Jurors did not aſſeſs any damages, or Coſt; which Verdict was inſufficient, and could not be ſupplyed by Writ of Inquiry of damages; wherefore the Plaintiff releaſed his damages, and coſts, and upon this had Judgement: upon which the Defendant brought a Writ of Error, and aſſigned the Error aforeſaid, ſcil. the inſufficiency of the Verdict; ſed Judicium affirmatur, becauſe the Plaintiff had releaſed his damages and coſts, which is for the benefit of the Defendant.

Releaſe of damages where none were aſſeſſed.

In Dyer 22 Eliz. 369. 370. In a Writ of Ejectione Cuſtodiæ terræ & hæredis, the Jurors aſſeſſed damages intirely, which was inſufficient; for it lay not for the Heir, yet the Plaintiff releaſed his damages, and had Judgement for the Land: And Note, that inſufficient aſſeſſment of damages, and no aſſeſſing, is all one.

Releaſe of damages where they were not well aſſeſſed.

The

Damages and Costs.

The Jury ought to assess no more damages pro injuria illata, then the Plaintiff declares for: But they may assess so much, and moreover give cost, which is called Expensæ litis; though in the proper and generall signification, Dampnum also comprehends Costs of Suit, as the Entry reciting both damages and costs, well affirms, scil. Quæ dampna intorto se attingunt cum, &c.

More damages than the Plaintiff declares for.

But if the Jury do assess more damages than the Plaintiff declares for, the Plaintiff may remit the overplus, and pray Judgement for the residue, as in the 10th Report, fol. 115. in Trespass the Plaintiff declared ad dampnum, &c. 40 l. at the tryall of the Jury assessed damages occasione transgressionis predict. ad 49 l. and for costs of suit 20 s. upon which Verdict, the Plaintiff at the day in Bank, remitted 9 l. parcel of the said 49 l. assessed for damages, and prayed Judgement for 40 l. (to which damage he had counted) with increase of Costs of suit, and had

Damages remitted.

9 l.

9l. de Incremento, added by the Court, which in all amounted to 30l. and had his Judgement accordingly: upon which, a Writ of Error was brought, and the Judgement affirmed.

For as in reall actions the Demandant shall not count to Damages, &c. because it is incertain to what sum the damages will amount, by reason he is to recover damages pendant le briefe; so in the case of Costs, he shall recover for the expences depending the suit, which being uncertain, cannot be comprehended in the Count, because the Count extends to damages past, and not to expences of suit. For in personall actions, he counts to damages, because he shall recover damages onely for the wrong done, before the Writ brought. and shall not recover damages for any thing, pendant le briefe. But in reall actions, the Demandant never counts to damages, because he is to recover damages also,

Damages in reall and personall actions.

so, pendant le briefe, which are incertain.

Damages and Costs intirely assessed.

The Jury may if they will, assess the damages and costs intirely together, without making any distinction, 18 E.4.23. But then they must not assess more damages and costs, then the damages are, which the Plaintiff counts to; for if they do, the Plaintiff shall recover onely so much as he hath declared for, without any increase of cost, because the Court cannot distinguish how much they intended for cost, and how much for damages.

As in 13 H.7. 16.17. One Darrel brought a Writ of Trespass, and counted to his damage 20. marks; the Defendant pleaded not guilty, and the Jury tered the damages and costs of suit joyntly to 22. marks. and the Verdict was held to be good for 20. marks, and void for the residue, because it doth not appear how much was intended for damages, and how much for costs, so that there may be more damages then the Plaintiff declared for, or

lesse,

leſſe, and ſo the Court knowes not how to increaſe the coſt; wherefore he ſhall have Judgement but for 20. marks, by reaſon of the incertainty.

Where a ſpecial Verdict is not entred according to the Notes, the Record may be amended, and made agree with the notes at any time, though it be 3, or 4, &c. Termes after it is entred. lib. 4. 52. lib. 8. 162. Cro. 1 part. 145. Verdict amended by the notes.

If the matter, and ſubſtance of the Iſſue be found, it is ſufficient; for preciſe forms are not required by Law in ſpecial Verdicts (which are the finding of Lay-men) as in Pleadings, which are made by men learned in the Law; and therefore Amendment in many caſes ſhall help a ſpecial Verdict, as much as a Teſtament, Arbitrament, &c. And therefore he which makes a Deputy, ought to do it by Eſcript, but when the Jury finde generally, that A. was Deputy to B. all neceſſary incidents are found by this; and upon the matter they finde, that Form, Hob. 54.

he

he was made Deputy by Deed, because it doth tantamount. lib. 9. 51. And in the 5th Report, Goodales Case. It was resolved, That all matters in a special Verdict, shall be intended, and supplyed, but only that which the Jury refer to the Consideration of the Court.

Ill conclusion. In all Cases where the Jury finde the matter committed to their charge, at large, and over more conclude against Law, the Verdict is good, and the conclusion ill. li. 4. 42. and the Judges of the Law will give Judgement upon the speciall matter, according to the Law, without having regard to the conclusion of the Jury, who ought not to take upon them Judgment of the Law. li. 11. 10.

More 165. 269.

As generall as the Narr. Where the Declaration in Trespas is Cum aliquibus averiis, of a number uncertain, and the Verdict is as generall as the Declaration, cum aliquibus averiis, there the Verdict is good. Cro. 2. part. 662.

In

In Ejectione firme, where the Plaintiff declared of a Meſſuage, and 300 Acres of Paſture in D. per nomina, of the Manno; of Monkhall, and five Cloſes per nomina, &c. upon Not guilty, the Jury gave a ſpecial Verdict, viz. quoad four Cloſes of Paſture, containing by Eſtimation 2000 Acres of Paſture, that the Defendant was Not guilty; Quoad reſiduum; they found matter in Law: And it was moved by Yelverton, that this Verdict was imperfect in all; For when the Jury finde that the Defendant was Not guilty of four Cloſes of Paſture, containing by eſtimation, 2000 acres of Paſture, it is incertain, and doth not appear of how much they acquit him. And then, when they finde quoad reſiduum the ſpecial matter, it is incertain what that Reſidue is, ſo there cannot be any Judgment given; and of that opinion was all the Court wherefore they awarded a Venire facias de novo, to try that Iſſue. Cro. 2. part. 113.

Quoad Reſiduum, incertain.

Ejectione

Ejectione firmæ of 30 Acres of Land in D. and S. The Defendant was found guilty of 10. acres, and

Quoad Residuum. Quoad Residuum not guilty; and it was moved in arrest of Judgment, That it is uncertain in which of the Vills this Land lay: and therefore no Judgment can be given: sed non allocatur, and it was adjudged for the Plaintiff; for the Sheriff shall take his Information from the party, for what ten acres the Verdict was. Cro. last part. 465. diversas apparet.

Circumstances. Where the Jury find Circumstances upon an Evidence given, to incite them to finde fraud, &c. yet the same is not sufficient matter upon which the Court can judge the same to be fraud, &c. Brownlow 2. part. 187. Yet in many Cases, the Jury may finde Circumstances and Presumptions upon which the Court ought to judge: As to finde that the Husband delivered Goods devised by the Wife: Upon this

More 192. the Court adjudged that the Husband assented to the devise at first.

Where

Where a Verdict is certainly given at the Tryall, and uncertainly returned by the Clerk of the Assizes, &c. The Postea may be amended; upon the Judges certifying the truth how the Verdict was given. Cro. 1. part. 338. Postea amended, how.

In many Cases a Verdict may make an ill Plea or Issue good. As in an action for words, Thou wast perjured, and hast much to answer for it before God; Exception after Verdict for the Plaintiff, in arrest of Judgement: For that it is not laid in the Declaration, that he spake the words in auditu complurimorum, or of any one, according to the usuall form: sed non allocatur; for being found by the Verdict that he spake them, it is not materiall, although he doth not say, in auditu plurimorum; whereupon it was adjudged for the Plaintiff. Cro. 1. part. 199. Ill Plea, made good by Verdict.

See Cro. last part 116. Where the Barr was ill, because no place of payment was alledged, yet the payment being found by Verdict, it

was adjudged well enough, for a payment in one place, is a payment in all places.

Treſpaſs by Baron and feme de clauſo fracto, of the Barons. And for the battery of the feme, ad dampnum ipſorum, the Defendant, Quoad the Clauſum fregit, pleaded Not guilty, Quoad the Battery juſtifies. And for the firſt Iſſue, it was found for the Defendant; And for the ſecond, for the Plaintiff, and now moved in arreſt of Judgment, that the Declaration is not good, becauſe the Baron & Feme. Baron joyns the feme with him in treſpaſs de clauſo fracto of the Barons, which ought not to be; But for the Battery of the feme, they may joyn, whereto all the Court agreed; But it was moved, that in regard it was found againſt the Plaintiffs for this Iſſue, in which they ought not to joyn, and the Defendant is thereof acquitted, and the Iſſue is found againſt the Defendant, for that part wherein they ought to joyn: This Verdict hath diſcharged the Declaration for that part

part which is ill, and is good for the residue. As in 9 E.4.51. Trespas by Baron and Feme, for the battery of both: The Defendant pleaded Not guilty, and found guilty, and damages assessed for the Battery of the Baron, by its self, and for the battery of the Feme by its self, and Judgment was given for the damages for the battery of the feme, & the Writ abated for the residue. (And of that opinion was Lea Chief Justice, & Doderidge al. contra.) And the same Law I conceive, if the Jury had found the Defendant Not guilty of the battery to the Husband, but guilty to the Wife. Cro. 2. part. 655.

Rochel and his Wife against *Steel*.

Rochel and his Wife, brought an action of trespass and assault in the Exchequer, Hill 16.59. against Steel, and others who pleaded Not guilty, and the Verdict found Steel guilty of the Battery to the Wife; but found nothing concerning the Husband. Wherefore Judgment was stayd; but the Barons held, that if the Jury had found the Defendants not guilty, as to the Husband, then the Verdict had helped

the Declaration, and the Plaintiff should have had Judgment for the damages, for the battery of the Wife.

Of what a Verdict may be.

The Jury may finde any thing that may be given in Evidence to them, as Records, either Patent, Statute or Judgment. Things done in another County, or Country; for which see Evidence before. Hob. 227. And of these things they ought to have Conusance, they are to have Conusance also, of all Incidents, and dependants thereupon; for an Incident is a thing necessarily depending upon another. Co. Littleton 227. b.

Plo. Com. 411.

Incidents.

The Verdict may be against the Letter of the Issue, so the substance is found.

If the matter and substance of the Issue be found, it is sufficient, though it be against the Letter of the Issue. As in the first, Institutes, fo. 114. b. A modus decimandi was alledged by prescription, time out of minde, for Tythes of Lambs: And thereupon Issue joyned. And the Jury found that before twenty years then last past, there was such a pre-

a prescription, and that for these twenty years, he had payd Tythe Lamb in specie. And it was objected first, that the Issue was found against the Plaintiff, for that the prescription was generall for all the time of the prescription, and 20. years fail thereof. 2. That the party by payment of Tythes in specie, had waved the prescription, or custome. But it was adjudged for the Plaintiff; for albeit, the modus decimandi had not been payd by the space of twenty years, yet the prescription being found, the substance of the Issue is found for the Plaintiff. Prescription.

In Assise of Darrein Presentment, if the Plaintiff alledge the avoydance of the Church by privation, and the Jury finde the voydance by death the Plaintiff shall have judgement; for the manner of voydance is not the title of the Plaintiff, but the voydance is the matter. 1 Inst. 282. Avoydance.

Deprivation.

If a Gardein of an Hospitall bring an Assise against the Ordinary, he pleadeth that in his visitation he deprived him as Ordinary, whereupon Issue is taken, and it is found that he deprived him as Patron, the Ordinary shall have judgement, for the deprivation is the substance of the matter. Ib.

Breach of 20. Trees cut down for 10.

The Lessée Covenants with the Lessor, not to cut down any Trées, &c. and binds himself in a Bond of 40. pounds, for the performance of Covenants. The Lessée cut down 10. Trées, the Lessor bringeth an action of debt upon the Bond, and assigneth a breach, that the Lessée cut down 20. Trées: whereupon Issue is joyned, and the Jury finde that the Lessée cut down ten: Judgment shall be given for the Plaintiff, for sufficient matter of the Issue is found for the Plaintiff, to forfeit the Bond. Ib.

And this Rule holds in Criminall Causes: For if A. be appealed,

ed, or indicted of Murder, viz. that he of malice prepenſed killed J. A. pleadeth that he is not guilty Modo & forma, yet the Jury may finde the Defendant guilty of Man-ſlaughter without malice prepenſed, becauſe the killing of J. is the matter, and malice prepenſed is but a Circumſtance. Plo. Com. 101.

Indictment of Murder, and Verdict findes Manſlaughter.

And generally where modo & forma, are not of the ſubſtance of the Iſſue, but words of form: there it ſufficeth, though the Verdict doth not finde the preciſe Iſſue.

Modo & forma.

As if a man bring a Writ of Entry in caſu proviſo, of the Alienation made by the Tenant in Dower to his diſinheritance, and counteth of the alienation made in Fée, and the Tenant ſaith, that he did not alien in Manner, as the Demandant hath declared, and upon this they are at Iſſue, and it is found by Verdict, that the Tenant aliened in tail, or for terme of another mans life. The Demandant ſhall reco-

Alienation.

ver, yet the alienation was not in manner as the Demandant hath declared. Littleton, Sect. 483.

Trespass by the Tenant against the Lord.

Also if there be Lord, & Tenant, & the Tenant hold of the Lord by fealty onely, & the Lord distrain the Tenant for Rent, and the Tenant bringeth a Writ of Trespas against his Lord, for his Cattel so taken, and the Lord plead that the Tenant holds of him by fealty and certain Rent, and for that Rent behinde he came to distrain, &c. And demand Judgement of the Writ brought against him Quare vi & armis, &c. And the other saith, that he doth not hold of him, in manner as he supposed; and upon this, they are at Issue. And it is found by Verdict, that he holdeth of him by fealty onely, in this case the Writ shall abate, and yet he doth not hold of him, in manner as the Lord hath said; For the matter of the Issue is, whether the Tenant holdeth of him or no; for if he holdeth of him, although that the Lord distrain, the Te-

Tenant for other ſervices which he ought not to have, yet ſuch Writ of Treſpaſs, Quare vi & armis, &c. doth not lye againſt the Lord, but ſhall abate. Littleton, Sect. 485.

Alſo in a Writ of Treſpaſs for Battery, or for Goods carried away, if the Defendant plead not guilty, in manner as the Plaintiff ſuppoſe, and it is found that the Defendant is guilty in another Town, or at another day, then the Plaintiff ſuppoſe, yet he ſhall recover.

The Verdi. may finde the Defendant guilty of the Treſpaſs at another day or place.

And ſo in many other caſes theſe words, ſcil. in manner as the Demandant or the Plaintiff hath ſuppoſed, do not make any matter of ſubſtance of the Iſſue. Littleton. Sect. 485.

And 'tis a Rule, that where the Iſſue taker, goeth to the point of the Writ or action, there Modo & forma are but words of form, as in the caſes aforeſaid.

Modo & forma. when words of form.

But when a Collateral point in plea ing is traverſed, as if a Feoffment

When of ſubſtance, & muſt be found by the Verdict.

ment be alledged by two, and this is traverſed Modo & forma; And it is found the Feoffment of one, there Modo & forma, is materiall; So if a Feoffment be pleaded by Déed, and it is traverſed Abſque hoc quod feoffavit, Modo & forma, upon this Collateral iſſue, Modo & forma are ſo eſſentiall, as the Jury cannot finde a Feoffment wityout Déed. Co. Littleton, 282.

So in *non aſſumpſit modo & forma*, upon an *Indebitatus aſſumpſit*, there *modo & forma*, were not materiall. *Secus*, when the action is upon a collaterall promiſe.

But here is a diverſity to be obſerved, That albeit the Iſſue be upon a Collaterall point, yet if by the finding of part of the Iſſue, it ſhall appear to the Court, that no ſuch action lyeth for the Plaintiff, no more than if the whole had been found, there Modo & forma, are but words of form, as in the aforeſaid caſe of the Lord and Tenant, it plainly appeares; for it was all one, whether the Tenant held by fealty onely, or by fealty and Rent, becauſe if either was true, the Tenant could have no Treſpaſs, Quare vi & armis, againſt the Lord in that caſe,

Treſpaſs *Quare vi & armis*, lies not againſt the Lord for diſtraining his Tenant, without cauſe.

case, by the Statute of Marlbridge. cap. 3.

After the Verdict recorded, the Jury cannot vary from it; but before it is recorded, they may vary from the first offer of their Verdict. And that Verdict which is recorded shall stand. 1 Inst. 227. Plo. Com. 312.

Jury cannot vary from their Verdict, when it is recorded.

There is also a Verdict given in open Court, and a privy Verdict given out of Court, before any of the Judges of the Court, so called, because it ought to be kept secret, and privy from each of the parties, before it be affirmed in Court.

Open Verdict, and privy Verdict.

Because the Jury may vary from their private Verdict, as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this shall stand, and the private Verdict shall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court, shall be adjudged their Verdict.

The Jury may vary from a private Verdict.

And

And although it is usuall to take the Verdict secretly, when the Jurors are agreed, yet this is not of necessity of Law, but of courtesie of Law for the ease of the Jurors, and in this case, their saying shall not be their Verdict, till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff shall be demanded, and then may be non-suited: But when they give their Verdict secretly, the Plaintiff is not demandable, nor can be then non-suited, but he may be non-suited, when the Verdict of right ought to be rendred. Ergo, the force is in the giving of the Verdict in the Court, and not elsewhere.

Bro. tit. Verdict. 12. And also in the Court it self, if they pronounce their Verdict, they may change it, if they be mistaken, or it be not full in Law, or for some other reasonable cause immediately perceived. Therefore if they may vary, and contradict their first Verdict given in open Court. A fortiore upon better advisement, they may

do ſo when their firſt Verdict was given out of Court, and they not diſcharged; for they be in the Cuſtody of the Baily, till they be diſcharged in Court. Plo. Com. 211. More 33.

The Jury having once given their Verdict, although it be imperfect, ſhall never be ſworn again upon the ſame Iſſue (unleſs it be in caſe of Aſſiſe, when the party is to recover by view of the Jurors). But there muſt be a Venire facias de novo. Cro. 2. part. 210.

Jury ſhall give but one Verdict in the ſame cauſe.

If a Verdict be good in part, and naught in another part, it ſhall ſtand in part, and a new Inqueſt ſhall be for the reſt. Bro. tit. Verdict. 89.

Verdict good in part.

For the Juries direction in their Verdict, greater liberty is permitted in pleading a matter doubtfull in Law; for, a Traverſe (for this Reaſon) may be omitted. As in debt againſt an Executor, It is a good plea to ſay, Adminiſtration was committed to him, and therefore he ſhould be named Adminiſtrator,

What permitted in pleading for the Juries direction in their Verdict.

for, and not Executor, without traversing that he is not Executor; for the lay-people know no difference, betwéen one administrating as Executor, and one administrating as Administrator, 9 E. 4 33.

For this Reason likewise, the speciall matter may be pleaded together with the generall Issue, &c. As that the Obligation put in suit, was sealed by him, and delivered to A. to kéep till certain Indentures were made betwéen the Plaintiff and him; before which Indentures made, the Plaintiff took the Obligation out of the possession of A. so is not his Déed. This is good, and yet by this generall conclusion, the matter precedent shall not be waved for it were perillous to put the speciall matter in the mouth of Lay-people. 9 H. 6. 38.

A Special non est factum.

A Jury of Middlesex was demanded in the Common-Pleas, the first day of the Terme, and some appeared, and some not, so that there was

Enquest by default.

was not a full Jury, and neither the Defendant, nor his Attorney did appear, and therefore the Plaintiff prayed, that the Inquest might be awarded by default; and by the opinion of Welsh and Dyer, his prayer shall be granted, and the Custos Brevium, and all the Prothonotaries said the course was so; for the parties are demandable before the Jury, and if the Plaintiff make default, he shall be non-suited, and if the Defendant make default, the Jury shall be awarded by default, whether they appear or not. Dyer 265.

What the Defendant looses by his default.

Where an Inquest is taken by default, the Defendant shall loose his Challenges, and by 28 Ass. p. 42. tit. Enquest in Fitz. he shall lose his Evidences also. Bro. Enquest 10.

Det. the Defendant pleaded a Release, and the Plaintiff replyed non est factum, and at the day of the Venire facias, the Defendant made default, and the Inquest was taken upon his default, and found for the De-

When the Defendant may be condemned by default, and when an Enquest must be taken upon the default.

Defendant, for which the Plaintiff took nothing by his Bill; And yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his default before the taking of the Verdict, Et sic vide, folly in le Plaintiff. Bro. Ib. 5. But upon such Release, and default in Trespass, the Enquest shall be taken by default, and the Defendant shall not be condemned by default, though the Plaintiff pray it, and the reason is, because the debt is certain, and the damages are incertain in Trespas. Bro. Ib. 3.

And Finch. fo. 429. hath well collected out of Brooke, that always in an Action of Trespass, whatsoever the Issue be, Release, Justification, &c. and also in Debt, Detinue, Accompt, and the rest which are for things in certainty, if the Issue be taken upon a matter in fait onely, as payment, or that an Acquittance pleaded in Barr by the Defendant, was made by Dures, &c. The Inquest shall be taken by default, if the Defendant makes default;

fault; But in the last recited actions of debt, &c. If the Issue be upon the acquittance it self, Release, or other matter in writing, the Plaintiff may pray Judgment upon the Defendants default, if he will, but if he do not pray it, the Jury shall be taken by default, as in an action of Trespass.

The Jury may give a Verdict without testimony, or against testimony, when they themselves have Conuzans of the fact. Plo. Com. 96. Verdict without, or against testimony.

CAP. XIV.

How the Jury ought to demean themselves, whilest they consider of their Verdict; when they may eat and drink, when not; What misdemeanor of theirs, will make the Verdict voyd; Evidence given them, when they are gone from the Barr, spoyls their Verdict: For what the Court may fine them, and where the Justices may carry them in Carts, till they agree of their Verdict. An Amendment offered by the Jury.

Jurors ought not to eat or drink.

THere is a Maxime, and an old Custom in the Law, that the Jury shall not eat, nor drink, after they be sworn, till they have given their Verdict, without the assent and Licence of the Justices; and that is by-

ordained by the Law, for eschewing of divers inconveniencies, that might follow thereupon; and that especially, if they should eat or drink, at the Costs of the parties; and therefore if they do so, it may be laid in arrest of Judgment.

But with the assent of the Justices, they may both eat and drink; as if any of the Jurors fall sick, before they be agréed of their Verdict, so soon that he may not commune of the Verdict, then by the assent of the Justices, he may have meat or drink, and also such other things as be necessary for him; and his fellowes also at their own costs, or at the indifferent Costs of the parties, if they so agrée, or by the assent of the Justices, may both eat or drink: and if the Case so happen, that the Jury can in no wise agrée in their Verdict; as if one of the Jurors knoweth in his own Conscience, the thing to be false, which the other Jurors affirm to be true, and so he will not agrée with them, in giving

For by assent of the parties they may eat and drink. Br. Jurors 2.

a falſe Verdict, and this appeareth to the Juſtices by Examination, the Juſtices may in ſuch caſe, ſuffer the Jury to have both meat and drink for a time, to ſee whether they will agree. And if they will in no wiſe agree, the Juſtices may take ſuch order in the matter, as ſhall ſeem to the, mby their diſcretion, to ſtand with reaſon and conſcience, by awarding of a new Inqueſt, and by ſetting fine upon them, that they ſhall finde in default, or otherwiſe as they ſhall think beſt, by their diſcretion; like as they may do, if one of the Jury die before the Verdict, &c. D. and Student. 158.

New Inqueſt when the Jury cannot agree.

If the Jury after their Evidence given unto them at the Barre, do at their own Charges eat or drink, either before or after they be agreed on their Verdict, it is finable, but it ſhall not avoid the Verdict; But if before they be agreed on their Verdict, they eat or drink at the charge of the Plaintiff, if the Verdict be given for him, it ſhall avoyd the Ver-

Where, if the Jury eat or drink, it ſhall avoid the Verdict, and where onely finable.

Verdict: But if it be given for the Defendant, it shall not avoid it; Et sic è converso. But if after they be agréed on their Verdict, they eat or drink at the charge of him, for whom they do passe, it shall not avoyd the Verdict. 1 Inst. 228.

To give the Jury money, makes their Verdict voyd by two Justices. Leon. 1 part 18.

If the Plaintiff after Evidence given, and the Jury departed from the Barr, or any for him, do deliver any Letter from the Plaintiff, to any of the Jury, concerning the matter in Issue, or any Evidence, or any escrowle touching the matter in Issue, which was not given in Evidence, it shall avoid the Verdict, if it be found for the Plaintiff, but not if it be found for the Defendant, Et sic è converso. But if the Jury carry away any Writing unsealed, which was given in Evidence in open Court, this shall not avoid their Verdict, albeit they should not have carried it with them. Ib.

What delivered to the Jury after Evidence, shall avoid their Verdict.

How the Jury ought to be kept by the Bayliff.

By the Law of England, a Jury after their Evidence given upon the Issue, ought to be kept together, in some convenient place, without meat or drink, fire or Candle, (which some Books call an imprisonment) and without speech with any, unless it be the Bayliff, and with him onely, if they be agreed. After they be agreed, they may in causes between party, and party, give a Verdict, and if the Court be risen, give a privy Verdict before any of the Judges of the Court, and then they may eat and drink, and the next morning in open Court, they may either affirm, or alter their privy Verdict, and that which is given in Court shall stand. But in criminall cases of life or member, the Jury can give no privy Verdict, but they must give it openly in Court. Ib.

When they may eat and drink. See *Smith's* Commonwealth. 74.

Where there can be no privy Verdict.

Where the Jury cannot be discharged before Verdict.

Neither can a Jury sworn and charged in case of life, or member be discharged by the Court, or any other, but they ought to give a Ver-

dict.

dict. And the King cannot be nonsuit, for he is in Judgment of Law ever present in Court, but a common person may be nonsuit. And in civill actions, the Justices upon cause, may discharge the Jury. Br. Enquest. 68. 47. 39. &c. The King cannot be nonsuit.

In Hillary Terme, Sexto H. 8. Rotulo 358. It was alledged in arrest of the Verdict at the Nisi prius, that the Jurors had eat and drunk. And upon Examination, it was found, that they had first agreed; and that returning to give their Verdict, they saw Rede Chief Justice in the way, going to see a fray, and they followed him, Et in veniendo viderunt cyphum, & inde biberunt. And for this, every one of them was fined 40 d. And the Plaintiff had Judgment upon the Verdict. Dyer 37. Jurors fined.

And Dyer 218. At the Nisi prius, the Jury after their charge given, returned and said, that they were all agreed except one, who had eat a Pear, and drunk a draught of Ale,

Jurors at the *Nisi prius*, fined in bank, for eating Peares, and drinking Ale.

for which he would not agree; And at the Request of the Plaintiff, the Jury was sent back again, and found the Issue for the Plaintiff. And the matter aforesaid being examined by the Oath of the Jurors Seperatim and the Bayliff who kept them, and found true, the offender was committed, and afterwards found Surety for his Fine. Si, &c. And Fitzherbert, the then Justice of Assise, gave him day in banco, &c. at which day a Fine of 20 s. was there assessed. Et quoad Ball: Curia avisare vult.

Fined for having Figgs and Peppins about them.

In trespass by Mounson against West, the Jury was charged, and Evidence given, and the Jurors being retired into a House, for to consider of their Evidence, they remained there a long time without concluding any thing, and the Officers of the Court who attended them, seeing their delay, searched the Jurors, if they had any thing about them to eat; upon which search it was found, that some of them

them had Figgs, and others Pippins, for which the next day, the matter was moved to the Court, and the Jurors were examined upon Oath: And two of them did confess, that they had eaten Figgs before they had agreed of their Verdict, and three other of them confessed, that they had Pippins, but did not eat of them; and that they did it without the knowledge or will of any of the parties. And afterwards the Court set a fine of 5 l. upon each of them which had eaten, and upon the others which had not eaten 40 s. But upon great advice and consideration had, and conference with the rest of the Judges, the Verdict was held to be good. Notwithstanding the said misdemeanor. Leon. 1. part 133:

And see the Book of Entries, 251. The Jurors after they went from the Barr, ad seipsos, of their Verdict to advise, Comederunt quasdam species, scil. Raisins, Dates, &c. at their own Costs, as well before, as after

Fined for eating Raisins and Dates.

after they were agreed of their Verdict. And the Jurors were committed to prison, but their Verdict was good although the Verdict was given against the King.

Finable for having sweet-meats, &c. about them, though they do not eat them. See *Plo. Com.* 519.

In Ejectione firme, it was found for the Defendant, three of the Jurors had Sweet-meats in their Pockets, and those three were for the Plaintiff, untill they were searched, and the Sweet-meats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, that whether they eat or not, they were finable for having of the Sweet-meats with them, for that is a very great misdemeanor. Godbolt 353.

One fined, and imprisoned for having *Sugar-Candy* and *Liquorish* about him.

Jurors carted.

40 Assise, Placito 11. The Justices said, that if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them, till they are agreed.

The

The Jury were gone from the Barr, to confer of their Verdict, and one of the Witnesses before ſworn on the Defendants part, was called by the Jurors, and he recited again his Evidence to them, and after they gave their Verdict for the Defendant. And complaint being made to the Judge of the Aſſiſes of this miſdemeanor, he examined the Enqueſt, who confeſſed all the matter, and that the Evidence was the ſame in effect, that was given before, Et non alia nec diverſa. And this matter being returned by the Poſtea, the Opinion of the Court was, that the Verdict was not good, and a Venire facias de novo was awarded. Cro. laſt part, 189.

The ſame Evidence given to the Jury, after they were gone from the Barr, ſpoils the Verdict.

The Plaintiff delivered an eſcrowl to a Juror impanelled, before he was ſworn, who afterwards being ſworn, and gone with the Jury from the Barr, to conſider of the Verdict, ſhewed the ſame Eſcrowle to his Companions, who found for the Plaintiff. The Miniſter who kept

Eſcrowle delivered to a Juror, before he was ſworn *Vitiates* the Verdict.

kept the Enquest, informed the Court hereof, and the Jury being examined, confessed the matter aforesaid, upon which Judgement was stayed; for after the Jury are sworn, they ought not to see, nor carry with them any other Evidence, but what was delivered to them by the Court: Afterwards the Plaintiff said, that the Escrowl proved the same Evidence, which was given to them at Barr by him; wherefore it was not so bad, as if it had been new Evidence not given before: Sed non allocatur. 11 H. 4. 17.

Church-Book delivered to the Jury, act of Court.

Pasche 38 Eliz. Inter Vicary et Farthing, at the Nisi prius. The Issue was about Non-age, and two Church-Books were given in Evidence, one whereof was delivered to the Jury in Court, by the assent of parties, and afterwards, the other was delivered to the Jury out of the Court by the Solicitor of the Plaintiff, without the assent of the Court, and a Verdict for the Plaintiff, and this was indorsed on the Postea;

Poſtea; The Queſtion was, whether this ſhould make the Verdict void or no, for the Juſtices differed in opinion, Popham and Gawdy, that it ſhould not; Fenner and Clench, that it ſhould; the Negative Juſtices gave theſe Reaſons. That the Book was delivered in Evidence in the Court, and ſo the other party might anſwer to it, and that the Court had informed the Jury of the validity thereof, how farr they were to believe it, with many other Reaſons: But the Affirmative was urged, becauſe there might be ſome matter in this Book, to induce them otherwiſe than was intended before, and becauſe it was delivered on his part, for whom the Verdict paſſed, without the Courts aſſent; yet one Book (ſcil. Cro. laſt part 411.) tells us, Judgement was afterwards given for the Plaintiff; ſee Mores Reports 452. The Books differ; for Cro. makes Clinch give his opinion for the Verdict. But More brings him on the other ſide, which I conceive is trueſt;

Conſider the Reaſons in the former caſes.

truest; and for my part, I know no reason, why forfeiting of Evidence to the Jury out of Court, should have any favour at all.

Escrowle from one who was no party.

Hill. 40 Eliz. Rot. 847. In arrest of Judgment after Verdict, it was alledged, that a Juror delivered to his Companions, an Escrowle for Evidence to them, which was not given in Evidence at the Tryall, and adjudged no cause to arrest Judgment, unless it had been received from one of the parties, which did not appear. More 546.

Jury adjourned.

In a Writ of Error, the first Error assigned was, that Termino Trin. twelve Jurors, and no more, did appear: This ex assensu partium, was adjourned untill Crastino Animar. on which day, two others came in and were sworn, being of the first Pannel.

The Court all clear of opinion, that this is no error, this being good

good enough, they being all to be called again. Leon. 3. part 38.

If a Juror depart after he is sworn, he shall be fined and imprisoned, and by assent of parties, another Juror may be sworn. Bro. Jurors 46. lib. 5. 40. Juror depart

If a man be non-suited after the Jury is ready to give their Verdict, the Court may cause the Amercement of the Plaintiff to be presently offered by the Jurors. li. 8. 39.

CAP.

CAP. XV.

What punishment the Law hath provided for Jurors offending; as taking reward to give their Verdict. Of *Embraceors*. *Decies tantum*. Attaint: several fines on Jurors. What Issues they forfeit, and of Judgement for striking a Juror in *Westminster*.

YOu have already heard how the Court may fine the Jurors for their misdemeanors in giving up their Verdict, I will proceed in shewing what punishments they are lyable unto, if they neglect their duty: and doubtless, no men have more need of knowing what penalties the Law inflicts on their offences, then common Jurors, who too often

often; being preingaged with favour to the Plaintiff, or malice against the Defendant, Et sic e converso; or with common Interest, (as they call it) where Tythes or Commons are in question, will neither hearken to their Evidence, nor direction of the Judge. But subvert the whole drift of the Common Law, which will have them of the Neighbour-hood, where the fact was committed, to the end, that they knowing most of the fact, may consequently give the best Verdict; yet contrarywise, Jurors which live neareſt, do now a dayes, most commonly so fetter themselves with favour or animosities to the parties, that those which live furtheſt off (as Juries from other Counties) for the most part, give the cleaneſt Verdicts. And how should the Judges remedy this mischief, but by severely punishing those Juries which offend; the Law in this will be their Guide; for without doubt, (excepting life and member)

the Law hath provided more severe punishments against Juries, then against any other offendor whatsoever; as well knowing that corruptio optimi est pessima: And common Jurors generally have nothing to do with this verse, Oderunt peccare boni, virtutis amore, Therefore 'tis fit they should be conterned in the next, Oderunt peccare mali, formidine pœnæ; wherefore the description of what this pœna is, shall be the conclusion of this Treatise.

The penalty of Jurors taking rewards.

If any Juror take a reward to give his Verdict, and be thereof attainted, at the suit of other than the party, and maketh fine, he which sueth shall have half the fine, and if any of the parties to the Plea, bring his Action against such Juror, he shall recover his damages. And the Juror so attainted shall have imprisonment for one year, which imprisonment shall not be pardoned for any

any fine, this is by the Statute of 34 E. 3. cap. 8.

5 E. 3. ca. 10. It is accorded, That if any Juror in Assises, Juries or Enquests, take of the one party, or of the other, and be thereof duly attainted, That hereafter he shall not be put in any Assises, Juries or Enquests; and nevertheless, he shall be commanded to prison, and further ransomed at the Kings will. And the Justices before whom such Assises, Juries and Enquests, shall passe, shall have power to enquire and determine according to this Statute. Shall not serve of any other Inquest. Imprisoned and ransomed, (that is) fined.

A man would think that these Statutes should have frighted any Juror from taking Rewards to give his Verdict. But

----Quid non mortalia pectora cogis,
Auri sacra fames?

So sacred is this love of money,

that Conscience her self must vail to it, and not stand in competition with such allurements: wherefore the Law did reedouble its force; nay more, produced a Decies tantum, scil. That a Juror taking reward to give his Verdict, shall pay ten times so much, as he hath taken; which forfeiture, my thinks, should make even those who love money best, refuse to take money upon such an account, because it is like a Canker in their Estates, depriving them in the end, of ten times more then it brought; for which, hear the Statute 38 E. 3. cap. 12.

Decies tantum;

Item, As to the Article of Jurors, in the 24th year, it is assented and joyned to the same, that if any Jurors in Assises sworn, and other Enquests to be taken between the King and party, or party and party, do any thing take by them or other of the party, Plaintiff or Defendant, to give their Verdict, and

and thereof be attainted by process contained in the same Article, be it at the suit of the party that will sue for himself, or for the King, or any other person, every of the said Jurors, shall pay ten times as much as he hath taken. And he that will sue, shall have the one half, and the King the other half. And that all Embraceors, that bring or procure such Enquests in the Country, to take gain or profit, shall be punished in the same manner and form as the Jurors. And if the Juror or Embraceor so attainted, have not whereof to make grée, in the manner aforesaid, he shall have the imprisonment of one year: And the intent of the King, of Great men, and of the Commons is, That no Justice, or other Minister, shall enquire of office, upon any of the points of this Article, but onely at the Suit of the party, or of other, as afore is said. Embraceors

Upon which Statute, there is a Writ called a Decies tantum; and who will, may bring it, for it is a popular Action and lies (as you see) where any of the Jurors, after he is sworn, taketh of one party, or of the other, or of both (and then he is called an Ambidexter) any reward to give his Verdict, &c. And it may be brought against all the Jurors and Embracors, although they take severall sums of money: and although the Jury give no Verdict, or a true Verdict. But it doth not lie against an Embracor, if he taketh no money, and imbraces, or taketh money, and doth not embrace. See Bro. Tit. Decies tantum 13. and F.N. Br. 171.

Ambidexter.

So F. N. Br. saith. But for my part, I think he is mistaken, for the Statute mentioneth nothing of his taking money; and in my opinion, the case of 37 H. 6. 13. is full against him.

An Imbraceor, is he that procures the Jurors in the Country, to take gain or profit, or comes to the Barr with the party, and speaks in the matter, or stands there to survey the Jury, &c. or to put them in fear, or solicits them to find on the one

Imbraceor.

side

ſide or other; and this Fellow cloaks his Embracery, under pretence of labouring the Jurors to appear, and to do their Conſcience: And thus the Atturneys in the Country, often take upon them to do, and many times put in a word or two for their Clyents; which practice deſerves the moſt ſevere puniſhment, next to their getting the Sheriff to return ſuch and ſuch in the Jury; which they, having been Under-Sheriffs themſelves, and ſo agree with one another, are moſt expert at.

Attorneys ill practice.

But Counſellors at Law, may plead for their money at the Barr; But they muſt not labour the Jury privately, and if they take money for this, they are Imbraceors. F. N. 6. 171.

Counſellors.

So much doth the Law hate, that Jurors ſhould privately take money for their Verdict. That certain Jurors were fined, for taking money after their Verdict, though there

Fined for taking money after their Verdict.

was no preingagement for it. 39 Assise. p. 19.

Jury fined for departing when he was challenged.

A Juror was challenged, and six other Jurors were sworn to try the Challenge, who found him indifferent, and thereupon the Jury was demanded, but did not appear; for which default, he was fined the value of his Lands for a year; and the other Jurors inquired of the value, &c. although the other party then would have challenged him when he was demanded, so that he might have been treir. But the Court would not admit this, because then the King would have lost his Fine. 36 H. 6. 27.

Juror adjourned upon pain.

If a Juror appear, and is adjourned upon pain, and makes default, in this Case, because he shall be fined to the value of his Land per annum, this shall be inquired by his Companions of the Jury, because the Court knowes not the value of his Land. li. 8. 41.

A

A Verdict was taken from the Fore-man of the Jury, to which one of them did not assent, and damages assessed to 20 s. in trespass and assault; and afterwards, every one of the 11. were fined, for giving their Verdict, before they were all agreed. 40 Assise 10.

Fined for giving a Verdict before they were agreed.

Where a Jury are to be fined, a Fine joyntly imposed on them, is not legall, but they must be severally fined, because the offence of one, is not the offence of another. Et nemo debet puniri pro alieni delicto; For then it might be said, Rutilius fecit, Æmilius plectitur. lib. 11. 42.

The Fine must not be joynt.

A man stroke a Juror at Westm. (sitting in the Court) who passed against him, and he was thereof indicted, and arraigned at the Kings Suit, and attainted, his judgment was, that he should go to the Tower, and stay there in prison, all dayes of his life, and that his right hand should be cut off, and his

Punishment for striking a Juror.

Lands

Lands seized into the Kings hands, 41 Assise. p. 25. and now our Juror sees what punishment it is to strike him, in the face of the Court. Let him hold his hands from others, least the same Judgment light on him.

By the Statute of 27 Eliz. cap. 6. It is Enacted, that upon every first Writ of Habeas Corpora, or Distringas, with a Nisi prius. 10 s. shall be returned in Issues, upon every person impannelled, and upon the second Writ 20 s. and upon the 3d, 30 s. And upon every Writ that shall be further awarded to try any Issue, to double the Issues last, afore specified, untill a full Jury be sworn.

Issues.

But if the Under Sheriff. &c. return a Juror summoned, who in truth was not legally summoned, & therefore doth not appear, and so loseth Issues, the Under-Sheriff shall pay him double the value of the Issues loss. See the Statutes of 35 H. 8. 6. and the 2 E. 6. 32.

Not summoned.

And note, the Law hath been so careful

careful to punish all offenders, who would endeavour to byas, and corrupt the Jury; and to punish the Juries themselves, if they receive money to give their Verdict, or any otherwise pre-ingage themselves to any of the parties; All which is to the end, that a true and honest Verdict may be given: What punishment shall that Jury have, which gives a false Verdict?

Such a punishment, that (as I said before) in civill Causes it is without example: and surely, if the Iurors did bear it in their minds, their Verdicts would be alwayes grounded upon their Evidence; and not upon their own Interests, or any partiality to either of the parties.

Wherefore if the Iurors give a false Verdict (which is periury of the highest degree) upon an Issue joyned betwæn the parties in any Court of Record, and judgement thereupon. The party grieved, may bring his Writ of Attaint, in the Attaint.

Kings

Kings-Bench, or Common-Pleas; upon which, 24. of the best men in the County are to be the Iurors, who are to hear the same Evidence which was given to the Petite Iury, and as much as can be brought in affirmance of the Verdict, but no other against it. And if these 24. (who are called the Grand Iury) finde it a false Verdict; then followeth this terrible and heavy judgement, at Common Law, upon the Petite Iury.

Judgement in Attaint.

1. That they shall lose liberam legem for ever, that is, they shall be so infamous, as they shall never be received to be a Witness, or of any Iury.

2. That they shall forfeit all their Goods and Chattels.

3. That their Lands and Tenements shall be taken into the Kings hands.

4. That their Wives and Children shall be thrown out of doors.

5. That their Houses shall be raised and thrown down.

6. That

6. That their Trees shall be rooted up.

7. That their Meadow-grounds shall be plowed up.

8. That their bodies shall be cast into the Goal, and the party shall be restored to all that he lost, by reason of the unjust Verdict. So odious is perjury in this Case, in the eye of the Common-Law: And the severity of this punishment, is to this end, Ut pœna ad paucos, metus ad omnes perveniat; for there is Misericordia puniens, and there is Crudelitas parcens. And seeing all Tryals of reall, personal, and mixt actions, depend upon the Oath of 12. men, prudent Antiquity inflicted this severe punishment upon them, if they were attainted of perjury. 1 Inst. 294.

But now by the Stat. of 23 H.8. cap.3. The severity of this punishment is moderated, if the Writ of Attaint be grounded upon that Statute.

But

But the party grieved, may at his Election, either bring his Writ of Attaint, at the Common-Law, or upon that Statute. Wherefore let the Iuror expect the greatest punishment, when he offends. 3 Inst. 163. 222.

And so I conclude with the words of *Fortescue*, Quis tunc (etsi immemor salutis animæ suæ fuerit) non formidine tantæ pœnæ, & verecundia tantæ infamiæ, veritatem non diceret? sic Juratus?

Who then, though he regard not his Souls health, yet for fear of so great punishment, and for shame of so great infamy, would not, upon his Oath, declare the truth?

FINIS.

Ex. J. M.
7/8/04